Supreme Court, U.S.
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No. 03 597 OCT 17 2003

In The

Supreme Court of the United States

PASCOAG RESERVOIR & DAM, LLC,

Petitioner,

vs.

THE STATE OF RHODE ISLAND, acting by and through JAN REITSMA, in his capacity as Director of the RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, and PATRICK LYNCH, in his capacity as Attorney General for the State of Rhode Island,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a physical taking, a landowner could have reasonably known, to a justifiable certainty, that its federal claim for compensation against a State had accrued and ripened prior to the resolution of contentious state court litigation as to whether the State had acquired an interest in the landowner's property?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties are identified in the caption of this case. Petitioner Pascoag Reservoir & Dam, LLC is a nongovernmental party. It is a limited liability company organized under Rhode Island state law, rather than a corporation. It does not have any parent corporations or companies. There are no publicly held companies that own interest of 10% or more of Pascoag. As a limited liability company rather than a corporation, Pascoag has members rather than shareholders, and therefore the term "interest" refers to membership interests rather than stock interests.

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OPINIONS BELOW

1. *Pascoag Reservoir & Dam, LLC v. State of Rhode Island et al*, 337 F.3d 87 (1st Cir. 2003) (App. 1-16)

2. *Pascoag Reservoir & Dam, LLC v. State of Rhode Island et al*, 217 F.Supp.2d 206 (D.R.I. 2002) (App. 17-60)

BASIS OF JURISDICTION

Jurisdiction exists pursuant to Rule 10 of the Supreme Court Rules, 28 U.S.C. § 2101(c), and 28 U.S.C. § 1254. This Petition seeks review of the opinion of the First Circuit Court of Appeals issued on July 28, 2003, affirming the opinion of the United States District Court for the Federal District of Rhode Island dated August 20, 2002 which granted the motion of the Respondent State of Rhode Island to Dismiss the Petitioner's Complaint.

CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. CONST. amend. V (". . . nor shall private property be taken for public use, without just compensation").

2. U.S. CONST. amend. XIV (". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .").

STATEMENT OF THE CASE

This petition involves an uncompensated physical taking of private property by the State of Rhode Island for

public use. The property in question is the Pascoag Reservoir, sometimes known as Echo Lake (the "Reservoir"), located in the Towns of Burrillville and Glocester, Rhode Island. The Reservoir covers approximately 350 acres of land, is two miles long and has more than ten miles of shore line. The Reservoir was created in 1860 by various mill owners, as a source of power, and is presently owned by the Petitioner, the Pascoag Reservoir &* Dam, LLC ("Pascoag").[1]

A. The State's Action in State Court Against Pascoag Based on Prescription

On April 22, 1998, the State of Rhode Island ("State") filed suit against Pascoag in the Superior Court for the State of Rhode Island sitting in Providence County. In that action, the State sought among other things to obtain title to, or a recreational easement over, the Reservoir. The State's legal theory was that it had acquired this interest in Pascoag's property by prescription under Rhode Island's adverse possession statute, GEN. LAWS R.I. § 34-7-1 *et seq.*

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[1] The First Circuit suggested, *sua sponte*, that Pascoag may not have standing to maintain this action because it did not own the Reservoir in 1975. However, under Rhode Island law, a successor in ownership acquires not only title to the property but also all of the grantor's rights, privileges and appurtenances in connection with the deeded property. GEN. LAWS R.I. § 34-11-28. These "rights, privileges and appurtenances" include the grantor's right to condemnation proceeds. *In Re D'Ellena*, 640 A.2d 530 (R.I. 1994). Here, the Reservoir was owned in 1975 by the Pascoag Reservoir Corporation. That entity conveyed the Reservoir in 1990 to the Pascoag Investment Corporation, which in turn conveyed the Reservoir to Pascoag in 1995. All three corporate entities are controlled by the same individuals.

The events culminating in the State's adverse possession action demonstrate that Pascoag's claim for inverse condemnation is both valid and timely, and further that the First Circuit erred in denying Pascoag just compensation.

The State filed its action only after haggling unsuccessfully to buy the Reservoir from its owners throughout the time period spanning 1986 through 1997. When sale negotiations ultimately broke down in 1997, the State announced for the first time ever that it had acquired an interest in the Reservoir by prescription. The State argued that its claim was based exclusively upon its installation of a boat ramp at the Reservoir circa 1965. However, in utter contradiction to its newly-adopted proprietary position, the State had abandoned an attempt to enlarge that boat ramp as late as 1996 due to "our inability to acquire an easement or fee title", as set forth in an internal memorandum generated by the Rhode Island Department of Environmental Management ("DEM"). Acting through DEM, the State had also insisted repeatedly, as seen in correspondence as early as July 10, 1979 and as late as October 14, 1997, that Pascoag and its predecessors were responsible for the repair, maintenance and upkeep of the Reservoir because *they* (as opposed to the State) owned the Reservoir.[2]

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[2] Easement holders have all such rights as are incident and appropriate to the reasonable and proper enjoyment of their easements. However, every benefit has a corresponding burden. Accordingly, easement holders have an obligation to repair and maintain their easements, as necessary. [*See Friends of the Sakonnet v. Dutra*, 749 F.Supp. 381 (D.R.I. 1991) for recitation of general rule] Thus, the State rather than Pascoag would have been responsible for repair,

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On April 3, 2000, after trial, the Rhode Island Superior Court held for Pascoag:

> The Court finds that no witness for the State, or the general public, has proven by clear and convincing evidence that their collective or individual use of the lake was pursued under a claim of right or was in any way hostile, open, notorious, or adverse to the interests of (Pascoag). The [c]ourt also finds that in the absence of such proof and in the face of the overwhelming credible evidence provided by the documentary evidence introduced at trial by (Pascoag), that (Pascoag) is the owner of said lake as aforesaid, and that any use engaged in by any member of the public of the lake, whether swimming, boating, or fishing was done at the sufferance of, and with the permission of (Pascoag) . . .

(App. 87) On the other hand, "[t]he State's witnesses have established only those contacts which are incidental to the normal and legitimate authority of the sovereign . . ." (App. 88)

The Superior Court concluded that the "State's assertion or claim of right to either adverse possession or a prescriptive easement to the lake is of recent vintage" and further that the State "in no respect of this case established . . . that its claim of interest in either the lake, lake bed, or dam, were in any way made under a claim of right, hostile or adverse to (Pascoag) or its predecessors in the

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maintenance and upkeep of the Reservoir, even assuming that it had acquired merely an easement.

title from the construction of the boat ramp to the present." (App. 88)

The State appealed and secured a reversal in the Rhode Island Supreme Court by a slim majority of three out of five. In its opinion of June 20, 2001, the Court ruled that the State had acquired title to the land beneath the boat ramp[3] by adverse possession in 1975 (i.e. ten years after installation of the boat ramp), and had procured a recreational easement over the entire Reservoir by providing public access to the Reservoir through the boat ramp. *Reitsma v. Pascoag Reservoir & Dam, LLC*, 774 A.2d 826 (R.I. 2001) (App. 61-82) Simply put, the Rhode Island Supreme Court looked no further than the installation of the boat ramp.

In order to accomplish its reversal of the Superior Court's judgment, the majority changed long-standing state law on adverse possession. Prior to its opinion, a putative adverse possessor had to prove, among other things, that it occupied that land of another under a "claim of right", meaning a subjective conviction as to ownership, however misguided.[4] The court re-confirmed this as recently as 1996 in *Anthony v. Searle*, 681 A.2d 892 (R.I. 1996).[5] In *Reitsma*, however, the Rhode Island Supreme

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[3] The boat ramp is thirty feet wide and forty-eight feet long. (App. 64)

[4] *See Gammons v. Caswell*, 447 A.2d 361 (R.I. 1982); *Lee v. Raymond*, 456 A.2d 1179 (R.I. 1983); *Taffinder v. Thomas*, 119 R.I. 545, 381 A.2d 519 (1977); *Paquin v. Guiorguiev*, 117 R.I. 239, 366 A.2d 169 (1976); *LaFreniere v. Sprague*, 108 R.I. 43, 217 A.2d 819 (1970); *Dodge v. Lavin*, 34 R.I. 514, 84 A. 857 (1912).

[5] In *Anthony*, the adverse possessor "not having had a formal lot survey performed . . . undertook to personally establish the northern

(Continued on following page)

Court rejected the subjective test honored by it throughout the course of Rhode Island jurisprudence in favor of an objective test: "A claim of right to own or use property will arise by implication through objective acts of ownership that are adverse to the true owner's rights." (App. 68) Thus, "the very act of placing a permanent physical structure on another's property" in and of itself amounted to a claim of right. (App. 74)

The Rhode Island Supreme Court also rejected Pascoag's suggestion that the State's conduct constituted the "first step in a land grab unrivaled within recent jurisprudence" and then took pains to insure that the State could do just that. The Court acknowledged that Pascoag's claim for inverse condemnation had been dismissed without prejudice prior to trial, yet the Court proceeded to note *sua sponte* in dicta, "Nevertheless, even assuming, without deciding, that (Pascoag or its predecessors) would have possessed viable just compensation claims. . . . such claims long ago would have lapsed . . ." (App. 79-80)

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boundary of his new property by what he perceived as being a 'visible boundary line.'" He then proceeded to cultivate the land to the south this boundary although it would later turn out that his true northern boundary was further south than he originally perceived. He prevailed because his claim of right grew out of his skill or lack thereof "as a boundary line surveyor." *See also Aud-War Realty Co., Inc. v. Ellis*, 557 A.2d 69 (R.I. 1989). There, the adverse possessor built a wooden shack one and a half feet into his neighbor's property. He was unable to acquire this footage by adverse possession, though, because of his "commendable candor" to the effect that he was "totally in the dark about the specific location of his easterly boundary" until three years before commencement of litigation. In other words, the claimant lost because he was not utilizing the land under a claim of right.

The minority authored a scathing dissent: "(We) do not believe the facts in the record support such a broad grant that amounts to a prescriptive easement for recreational use on property indisputably held in private hands and for which the state never claimed an interest and did so only after it was foiled in its attempt to purchase the lake." (App. 82-83)

> It is understandable that a fact-finder would wonder why the State of Rhode Island, the sovereign and the repository of all documents dealing with state property, including the construction of a boat ramp, could not produce a single piece of paper referring to this project. This is particularly telling when (Pascoag) has produced reams of evidence demonstrating that the lake owners jealously guarded their ownership of the lake and enjoyed a long-term, friendly and permissive relationship with the state . . .

(App. 93)

The minority did not mince words saying, in effect, that the majority's decision was result-oriented:

> Indeed, a fair reading of the record in this case suggests that the state was stunned by the voluminous documentary proof offered by (Pascoag) establishing a long history of beneficence toward the abutters and the public to use and enjoy the reservoir. Tellingly, the argument by the state sums up the result the majority has reached today: "Well, the mills have gone south and times have changed, so what is the economic utility of this (reservoir) now? It's to support the residential subdivision along the shores."

(App. 97)

The minority, understanding that only the judiciary can stand between the State's naked power and the constitutional rights of its subjects, concluded in the strongest language available to it that the majority's decision was "incorrect and unjust", and declared that Pascoag "should be compensated." (App. 100, 97)

B. Pascoag's Federal Taking Action in the United States District Court of Rhode Island

On October 18, 2001, Pascoag took the minority to heart. It filed suit in the United States District Court of Rhode Island to assert its federal inverse condemnation claim. (App. 101-108) The State moved to dismiss Pascoag's complaint based upon the statute of limitations. In response, Pascoag argued that its complaining was not time-barred because its claim did not accrue until the Rhode Island Supreme Court decided *Reitsma*. Before that Court reversed the judgment of the trial court, Pascoag still owned the Reservoir and its lake bed in its entirety, without limitation. Thus, Pascoag *had no case for a taking until it lost in the Rhode Island Supreme Court*, when its property rights and interest were finally resolved or stabilized.

The District Court of Rhode Island agreed with Pascoag what a state's acquisition of private property by prescription gives rise to a takings claim under the United States Constitution:

> This dispute places this Court in a curious juncture between property law and constitutional law. In property law, it is a straightforward proposition that, under certain conditions, title to property may, by operation of law, be transferred

> to another without compensation. In constitutional law, it is a straightforward proposition that government cannot take private property without just compensation. This Court must determine how these two propositions interact with each other. Although (the State) contends that the two areas of law are mutually exclusive, they are not. Any state statute must adhere to the requirements of the United States Constitution. In this case, the Court concludes that (Pascoag) has alleged a takings claim against the State of Rhode Island.

(App. 18)

The District Court ruled further that the conclusion of the prescriptive period back in 1975 did not mark the accrual of Pascoag's federal claim for compensation. To quote the District Court:

- "Pascoag's predecessor may not have had a ripe cause of action in federal court in 1975." (App. 57)
- "[A] takings claim is not ripe for federal court review until there is a final decision by the state court on the merits." (App. 55-56)
- "This court is well aware that a federal takings claim is ripe only after a state court renders a final decision on the merits, and the statute of limitations does not begin to run in a federal takings claim until the claim is ripe under federal law." (App. 57)
- "For state law purposes, this claim is twenty-three years old, yet it is only ripe for federal law purposes now." (App. 57)

Although the District Court recognized that Pascoag's federal claim had only just recently ripened due to the decision in *Reitsma*, it nevertheless dismissed the claim as

if it were a generic state law claim that had accrued in 1975 and had become time-barred three years later. (App. 57-58)

C. The First Circuit's Decision

Pascoag appealed the District Court's grant of the State's Motion to Dismiss Petitioner's complaint. The First Circuit Court of Appeals affirmed, although it held that the statute of limitations[6] should apply seemingly without regard to any notion of an independent federal claim, and summarily dismissed any concern with ripeness in a footnote. (App. 8-15) According to the First Circuit, the term "ripe" is confusing (although this Court appears to be content with it). Ultimately, the First Circuit made no attempt to clarify its perceived confusion apart from noting that Supreme Court precedent may reveal a claim "to be either unripe (too early) or overripe (too late)." (App. 11) Terminology aside, the stakes in this case are high, involving 350 acres of land rather than a few melons.

The First Circuit held further, *sua sponte*, that Pascoag should have filed suit for compensation in the State

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[6] And what is the appropriate statute of limitations? Well, that depends on which court's view one relies upon. The Rhode Island Supreme Court suggests that the appropriate suit limitations period may be ten years; the United States District Court suggests that the period is three years; and the United States Court of Appeals suggests that it is one year. (*N.B.* Each court suggests that the suit limitations period began to run at the end of the prescriptive period, in 1975.) While these decisions provide no guidance for the perplexed (and further emphasize the confusion faced by Pascoag), Pascoag filed its takings claim within three months after the parties' property interests were finally resolved by the Rhode Island Supreme Court in *Reitsma*.

Court, even though the Rhode Island Supreme Court had already made clear to Pascoag (and to the world, for that matter) the futility of such an action, given its gratuitous views on accrual and timeliness. (App. 11-15) The First Circuit did not reach the issue raised in the State's cross-appeal, namely, whether governmental acquisition of private property via prescription amounts to a taking. (App. 3)

WHY THE WRIT OF CERTIORARI SHOULD ISSUE

I. The State of Rhode Island's Acquisition of Pascoag's Property by Prescription is a Taking Requiring Just Compensation

The Fifth Amendment to the U.S. Constitution states that "private property shall not be taken for public use without just compensation." The Takings Clause of the Fifth Amendment, of course, applies to the states through the Fourteenth Amendment, *Chicago, B. & O. R.R. Co. v. City of Chicago*, 166 U.S. 226, 241, 17 S.Ct. 581, 586 (1897), and applies to takings by inverse condemnation as well as by eminent domain.

Although the First Circuit mused during oral argument that the loss of property by prescription may not give rise to a taking, it reserved that question in its opinion. However, the First Circuit's hesitancy is simply out of sync with the constitutional mandates of this Court. Here, the State acquired a recreational easement that limits Pascoag's right to exclude others and, in fact, requires Pascoag to suffer the presence of the public in perpetuity thereby precluding any other use that Pascoag may make of the Reservoir.

> To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather 'a mere restriction on its use' . . . is to use words in a manner that deprives them of all their ordinary meaning. . . . We think a 'permanent physical occupation' has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

Nollan v. California Coastal Comm., 483 U.S. 825, 831-32, 107 S.Ct. 3141, 3145-46 (1987).

The State acquired the paramount rights which inhere in ownership of property – control of use of the property and exclusion of others from it. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S.Ct. 2448, 2457 (2001)[7]; *Loretto v. Teleprompter Manhattan CATV Corp.*,

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[7] In *Palazzolo*, this Court criticized the Rhode Island Supreme Court's efforts to support the State of Rhode Island at the expense of its citizens. The Rhode Island Supreme Court determined that Palazzolo had not used every possible avenue to seek use of his property and still had options for development to pursue (notwithstanding at least four denials). This Court made relatively short shrift of this argument:

> The suggestion is that while the Council rejected petitioner's effort to fill all of the wetlands, and then rejected his proposal to fill 11 of the wetland acres, perhaps an application to fill (for instance) 5 acres would have been approved. Thus, the reasoning goes, we cannot know for sure the extent of permitted development on petitioner's wetlands.

533 U.S. at 619; 121 S.Ct. at 2458. The United States Supreme Court rejected this approach noting that the wetlands regulations at issue were unequivocal and that there was no indication that the Coastal

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458 U.S. 419, 433, 102 S.Ct. 3164, 4174-75 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80, 100 S.Ct. 383, 393 (1979). It does not matter *how* the State took these property interests; what is important is that the Constitution mandates that the State pay compensation for *what* it took. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314-15, 107 S.Ct. 2378, 2385-86 (1987).

II. Pascoag's Federal Taking Action Accrued When the Rhode Island Supreme Court Decided the Underlying Litigation

Normally, when a sovereign has physically invaded private property, the extent, and even the fact, of the physical taking are obvious and known at that time, and any taking compensation goes to the owner at that time, not to a subsequent owner. The landowner's federal taking claim accrues upon the government's physical occupation of the property, typically prompting actual or constructive notice to the landowner of the injury. *Palazzolo*, 533 U.S. at 628, 121 S.Ct. at 2463 (2001); *United States v. Dow*, 357 U.S. 17, 20-21, 78 S.Ct. 1039, 1043-44 (1958).

Although Pascoag was not the owner of the Reservoir at the time of conclusion of the prescriptive period (1975), as noted above, this fact does not bar Pascoag from compensation as a successor owner. The First Circuit held

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Resources Management Council ("CRMC") would have accepted Palazzolo's proposal had it encompassed a smaller area because it had already decided that the proposed use was not a compelling public purpose, regardless of size.

that Pascoag's District Court claim was time-barred because Pascoag did not seek compensation in the State court within some unspecified suit limitations period following the conclusion of the ten-year prescriptive period back in 1975. (App. 11-15) However, this perfunctory disposition by the First Circuit completely dismissed the significance of the unique evolution of the State's grab of Pascoag's property as described above, and its effect on notice to the owner of the Reservoir. Had the First Circuit taken into account pertinent federal precedent on claim accrual in a physical taking, its decision would have been different.

A. In a Physical Taking, the Landowner's Federal Cause of Action for an Uncompensated Taking Accrues When the Status of the Property Has Stabilized Sufficiently that the Landowner Knew or Should Have Known that it Had a Taking Claim

The law on accrual of a federal taking claim in a physical taking begins with *United States v. Dickinson*, 331 U.S. 745, 67 S.Ct. 1382 (1947). *Dickinson* concerns a taking which occurred by a continually evolving physical occupation by the government. It built a dam, causing water levels to rise and flood plaintiff's property. The statute of limitations on the landowner's taking claim did not begin to run when the dam first impounded water, nor when it was fully operable and the land was partially submerged. This Court noted that the Government could have condemned the property, but instead allowed time to pass (as in this case), "thereby putting on the owner the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking

could no longer be in controversy." *Dickinson*, 331 U.S. at 748, 67 S.Ct. at 1384.

This Court emphasized the priority which just compensation takes over mechanical time limitations, stating that the Constitution is "intended to preserve practical and substantial rights, not to maintain theories." *Id.* [*citing Davis v. Mills*, 194 U.S. 451, 457, 24 S.Ct. 692, 695 (1904)].

> The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding "causes of action" – when they are born, whether they proliferate, and when they die.
>
> We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him – for instance, the uncertainty of the damage and the risk of *res judicata* against recovering later for damage as yet uncertain. The source of the entire claim – the overflow due to rises in the level of the river – is not a single event; it is continuous. *And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized.*
>
> When dealing with a problem which arises under such diverse circumstances, procedural

> rigidities should be avoided. All that we are here holding is that when the Government chooses not to condemn land but to bring about a taking by a continuous process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really "taken".

331 U.S. at 748-49, 67 S.Ct. at 1385 [emphasis added].

Dickinson is the source of the doctrine that where (as here) the Government has taken property not by condemnation but instead by allowing a physically invasive process to evolve, the owner is not faced with a running suit limitations clock until the situation has become sufficiently defined that the taking and its extent are complete and ascertainable. Although *Dickinson* concerned literal stabilizing of flood levels, the stabilization doctrine has broadened to encompass more general circumstances and conditions that affect notice to the landowner that he has a taking claim.

Dickinson "stabilization" factors are not limited to the existence and extent of the literal physical incursion into a landowner's property. Determination of when stabilization occurs is highly fact-intensive and varies with each case. *Cooper v. U.S.*, 825 F.2d 762, 764 (Fed. Cir. 1987) [*citing Barnes v. United States*, 538 F.2d 865, 873 (Cl.Ct. 1976)].[8]

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[8] The fact that the plaintiff in *Cooper* acquired legal title to the property only two years earlier did not bar his claim. Although many pertinent events had occurred during his predecessor's ownership, it was during the plaintiff's ownership that the damage stabilized and the claim accrued. *Id.* at 764.

Stabilization considerations include conduct by the government which might dissuade a landowner from filing an action for just compensation. For example, *Applegate v. United States*, 25 F.3d 1579 (Fed. Cir. 1994), involved a landowner's claim that a taking has occurred as a result of erosion of their beach front property due to a federal harbor project. Uncertainty about the status of the property tolled the suit period. Intermittent representations by government employees about restoring Plaintiffs' eroded land was a significant stabilization factor holding back the start of the suit limitations clock. Because of the government's promises, "the landowners did not know when or if their land would be permanently destroyed." *Id.* at 1583. "Uncertainty stayed accrual of the claim" where the "Government's promises to restore the littoral flow destroyed any predictability of the extent of the damage to the land," tolling the statute of limitations "as long as the landowners remain justifiably uncertain about the permanency of the erosion and the taking." *Id.*

The most recent federal jurisprudence applies a "knew or should have known" or a "justifiable uncertainty" test to the landowner to determine the time of accrual for a taking claim for a physical taking. Presumably, the federal courts perceive the inherent unfairness in barring a landowner from compensation for the loss of his property to the government if that landowner could not reasonably have been aware of the fact and extent of his loss.

In *Boling v. U.S.*, 220 F.3d 1365 (Fed. Cir. 2000), Plaintiff's land was eroded as a result of artificial land cuts that were made to create a more navigable waterway. The time of accrual of Plaintiff's was gauged by whether "all events which fix the government's alleged liability have occurred and the plaintiff was or should have been

aware of their existence." *Id.* at 1370 [*citing Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988). Once the permanent nature of the taking was evident and the damages were reasonably foreseeable, the taking claim accrued. *Id.* at 1372-73. This determination being intensely fact-driven, the case was remanded to the Court of Federal Claims for a factual inquiry.

In *Banks v. U.S.*, 314 F.3d 1304 (Fed. Cir. 2003), property owners sued to recover for a taking of their property due to erosion of their shoreline caused by government-constructed jetties. Their taking claims did not accrue when the jetties were constructed, nor as their shoreline eroded, nor during the fifteen year period while the government took action to mitigate the situation. During that lengthy period of time, although the problem was apparent, it remained unclear whether there in fact was any permanent taking. Rather, it was not until expert reports stating that the situation was permanent and irreversible were issued that the landowners' claims accrued and the statute of limitations began to run. "Stabilization (in a taking claim following a physical taking) occurs when it becomes clear that the gradual process set into motion by the government has effected a permanent taking, not when the process has ceased or when the entire extent of the damage is determined." *Id.* at 1308 [*citing Boling*, *supra*, at 1370-71]. The *Banks* court clarified *Applegate*, *supra*, emphasizing that "the critical element" that delays stabilization (and thus accrual and the running of the statute of limitations) is the landowner's "justifiable uncertainty about the permanency of the taking." *Id.* at 1309 [*quoting Applegate*, 25 F.3d at 1372]. The taking claim only "stabilizes when the 'permanent

nature' of the taking is evident." *Id.* [*quoting Fallini v. U.S.*, 56 F.3d 1378, 1382 (Fed. Cir. 1995)].

Most recently, the role of notice to the landowner within the stabilization doctrine has been examined in *John R. Sand and Gravel Co. v. U.S.*, 57 Fed.Cl. 182 (2003). In that case, a long-term lessee of a 158-acre parcel filed a physical taking claim because, over a period of years, the Environmental Protection Agency had accessed the land, installed fences and monitoring wells, and removed hazardous materials. The lessee's taking claim did not accrue until its property "had been clearly and permanently taken." *Id.* at 187 [*citing Hornback v. U.S.*, 52 Fed.Cl. 374, 377 (2002); *Boling*, 220 F.3d at 1370]. The requisite completeness of the physical invasion and occupation of the land to trigger accrual had not occurred (with the exception of a few places on which the government had installed permanent wells). *Id.* at 189. The government's actions were analogized to the "continuous process of physical events" addressed in *Dickinson*.

The *Sand* court rejected the government's argument that the lessee's claim accrued because it was aware of all of the facts necessary to establish the government's liability. Rather, the court explained, fact awareness alone is not enough. Conditions must have already stabilized, and then the landowner's notice of his claim must be examined. *Id.* at 190 [*citing Dickinson*, *supra*; *Boling*, 220 F.3d at 1371] Thus, even though the lessee had earlier known that it had a potential taking claim (as evidence by its attorney's letters attempting to negotiate a settlement), "this is not a good enough reason why he must sue then or

have, from that moment, the statute of limitations run against him." *Id.* at 192 [*citing Dickinson*, 331 U.S. at 749; 67 S.Ct. at 1382].[9]

B. Before the Landowner's Federal Claim for Just Compensation Accrues and Ripens, Underlying State Court Litigation as to the Existence and Scope of the Property Interest Taken Must be Finally Resolved

Federal courts have consistently held that underlying state court litigation, concerning the existence and scope of the property interest allegedly taken, must be resolved before a landowner's federal claim for just compensation accrues and ripens. Otherwise, a landowner would have to pursue a claim that may be vague and undefined or even rendered moot by the state court's decision (which is, of course, why Pascoag's counterclaim for inverse condemnation in the underlying state court litigation was dismissed without prejudice at the trial court level).

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[9] *Compare Nollan v. California Coastal Comm.*, *supra*, which involves a regulatory taking. Before the beach front landowners in *Nollan* acquired their property, they were already aware of a pre-existing building permit requirement that owners must provide a public easement to the waterfront. Yet, they had a taking claim which accrued upon the "triggering event" of the state's compulsion that they provide the easement. Thus, it is the *impact* of the event that is alleged to be a taking, rather than notice of that event alone, which determines when the taking claim accrues and who has standing to bring such a claim. *See Palazzolo*, 533 U.S. at 642-43, 121 S.Ct. at 2471 (Stevens, J., dissenting).

• In *Norco Const., Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986), a developer sought approval of his proposed plat to subdivide and construct houses. The county failed to act upon Norco's proposal and enacted an ordinance requiring deferral of plat approvals that were inconsistent with pending amendments to the county comprehensive plan. Norco then petitioned the state court for issuance of a writ of mandamus to compel action on his application. The writ issued, requiring action under ordinances in effect at the time the application was filed. It was affirmed by the state supreme court. The county only then approved Norco's application. Norco then sued the county alleging, *inter alia*, that he was damaged by the county's taking of his property without just compensation. Although state statutes of limitations applied, the Ninth Circuit held that the developer's takings action was not time-barred. The cause of action did not accrue until the state supreme court had issued its opinion affirming issuance of the writ of mandamus and the county made its final decision on the plat proposal. Federal and state claims for inverse condemnation and related damages claims "are not matured until planning authorities and state review entities make a final determination on the status of the property." *Id.* at 1145-46 [*following Williamson Co. Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 170, 105 S.Ct. 3108 (1985)] To hold otherwise would bar relief before the landowner has a right to enforce his claim. *Id.* at 1146.

• In *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990), Corn's efforts to develop his parcel of land had been thwarted when the city tabled his site plan, amended its ordinances changing permitted uses on the property, and then denied plaintiff's plan. The state court

granted Corn's petition for a writ of mandamus, held the new ordinances inapplicable to Corn's plan, and ordered the city to approve it. Corn then initiated federal court litigation alleging a temporary taking. The City responded by moving to dismiss Corn's takings claim on the ground that, *inter alia*, it was time-barred. The District Court, rejected the city's contention and the Eleventh Circuit affirmed because Corn's taking action did not accrue until the state appeals court's final decision on mandamus, which determined, with finality, the status of Corn's property, a necessary antecedent to the takings action. *Id.* at 588 [*citing Norco, supra*].

• The Eleventh Circuit later expanded the rule in *Corn* in *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488 (11th Cir. 1993), in which the county had re-zoned plaintiff's land from "residential/duplex" to "private airport". Plaintiff petitioned the state court for a writ of certiorari, alleging that the re-zoning violated state procedural requirements for re-zoning large tracts of land. Plaintiff sold the land while the petition was pending, and amended its state court petition to include a claim that the re-zoning had effected a taking of its property without just compensation. The state court invalidated the rezoning, but denied damages to the plaintiff. Plaintiff then sued in federal court for just compensation, in response to which the government moved to dismiss on the statute of limitations. The Eleventh Circuit held that notwithstanding the owner's sale of the affected property, the determination of the accrual date of a federal takings claim depends on (1) the date of the final determination by state judicial authority of the status of the affected property, and (2) the denial of an adequate post-deprivation remedy to the property owner. *Id.* at 1493. Since the plaintiff's action

was filed within the statutory period following the state court's final determination, the federal court action was timely filed, notwithstanding the plaintiff's sale of the property before the state court action had finally concluded. Until final adjudication in the state court of the underlying status of the affected property, and the denial of a remedy to the landowner, no cause of action for just compensation has yet accrued. *Id.* at 1494 [*citing Corn*, 904 F.2d at 588]

- In *Katz v. Stannard Beach Ass'n*, 95 F.Supp.2d 90 (D.Conn. 2000), the Plaintiffs were sued in state court by the political subdivision in which their property was located. In that action, the government sought the declaration of an easement over Katz land to the beach, alleging that the Plaintiffs had improperly blocked a walkway to the shore and replaced it with bushes. The Plaintiffs meanwhile initiated an action in federal court alleging that the claims in the state court action amounted to a taking under the Fifth and Fourteenth Amendments of the U.S. Constitution and parallel provisions of the state constitution. Following *Williamson County*, *supra*, the District Court in Connecticut dismissed the Katz takings claims as premature and unripe, as they were merely "based on the potential that at some point in the future the state court action may be resolved in a manner unfavorable to their claim of exclusive property ownership." *Katz*, 95 F.Supp. at 98. Until the government had already conclusively established its property interest in the Plaintiffs' land, their takings action in the federal court would not yet lie.

- In *Mehta v. Surles*, 720 F.Supp. 324 (S.D.N.Y. 1989), the landowners alleged in federal court that the use of a common driveway by a community mental health

facility constituted a taking without just compensation. The federal takings action was dismissed as unripe, though, because the state court had yet to resolve the scope of the driveway easement in another piece of litigation, then pending. Until that time, no property deprivation allegation was legally cognizable because the parties' respective property rights in the common driveway had not yet been clarified by the state court. *Id.* at 334, *aff'd in part, vacated in part on other grounds*, 905 F.2d 595, 599 (2d Cir. 1990)

C. Pascoag's Taking Claim Did Not Accrue Until the State Supreme Court Decided that the State Had Acquired an Interest in Pascoag's Property, Thereby Stabilizing the Status of the Property

Pascoag did not unduly delay seeking just compensation. Before June, 2001, Pascoag required no such remedy nor was it available to Pascoag. Moreover, Pascoag could not reasonably have known that it had such a claim. Before the Rhode Island Supreme Court reversed the trial court's holding in June, 2001, the State's recent prescriptive claim had gone for naught and was, at best, unresolved. It is also noteworthy that the State had actually negotiated with Pascoag to purchase the Reservoir practically up to the moment that it filed suit in 1998 and had steadfastly insisted that Pascoag and its predecessors maintain the Reservoir, as its sole owner, prior thereto. These circumstances created a state of "instability" or "justifiable uncertainty" for which Pascoag cannot be charged.

As discussed above, the Rhode Island Supreme Court found it necessary to change long-settled law in order to

achieve a reversal of the trial court's judgment for Pascoag. However, because the State had continually and affirmatively represented to Pascoag that it did not consider itself to hold any interest in Pascoag's property, Pascoag was never on notice, in real time, that the State had obtained such an interest (in utter contradiction to its own representations and actions). Moreover, Pascoag could not have known – short of premonition – that it would be held to a standard of "claim of right" theretofore unknown in Rhode Island law on adverse possession and prescription. Yet, this is precisely the legal conundrum which the First Circuit adopted, leaving Pascoag with a wrong for which it could not have obtained a remedy before the State Supreme Court's final disposition of the underlying litigation.

Until the State Supreme Court finally resolved questions of who held what interests in the property, Pascoag was in a state of "justifiable uncertainty", and its taking claim had not yet accrued or ripened. Yet, the First Circuit's decision forecloses Pascoag's federal taking claim by implicitly adopting dicta in the Rhode Island Supreme Court's opinion as to the timeliness of any state law taking claim.[10] This cannot stand.

Pascoag accepts the decision of the Rhode Island Supreme Court as to prescription – as it must – but it cannot abide the piracy of its claim for just compensation. As the District Court astutely observed, federal courts are not bound by state court determinations on issues of federal law. (App. 46) To base the deprivation of a landowner's *federal* takings compensation on the unavailability

[10] An issue not even before the state supreme court.

of a state remedy would turn federal takings jurisprudence on its head – it is, after all, the unavailability of a state remedy which gives rise to the landowner's federal taking claim.

III. The First Circuit Failed to Recognize that the Futility of Seeking a State Law Remedy Entitled Pascoag to Pursue a Federal Taking Claim

To add insult to injury, the First Circuit decided that Pascoag should have pursued its inverse condemnation claim in state court, even though it recognized a "futility" exception where "the granting authority has dug in its heels and made it transparently clear that the (desired result) will not be forthcoming." (App. 9) The First Circuit acknowledged that the Rhode Island Supreme Court had taken it upon itself to discuss Pascoag's taking claim, dismissively, in dicta as follows:

> [E]ven if the state's conduct from 1965 to 1975 had been unlawful and amounted to an improper taking of the lake owner's property without paying just compensation, and even if the lake owner's property had been taken in the constitutional sense until the prescriptive period ended in 1975 – issues that we have no need to decide in this case – the corporation and its predecessors failed to assert any takings claim in a timely manner. Thus, they are barred from asserting them now under any statute of limitations that possibly could apply to such claims . . .

(App. 9-10) Although this language was surely designed to discourage Pascoag from proceeding further, the First Circuit asserts that "Pascoag offers no compelling explanation for not using state procedures." (App. 10-11) This is

utterly disingenuous for two reasons. To begin with, the First Circuit raised the "futility issue" on its own – the State itself knew better than to make this argument. Thus, no one asked Pascoag for an explanation because this was not an issue before either the District Court or the First Circuit, for that matter, until the First Circuit made it an issue, and then only in its opinion.

Second, the First Circuit has framed the issue to suggest that the Rhode Island courts may have seen fit to entertain an inverse condemnation claim had it been brought in 1975 or some time shortly thereafter. By so doing, the First Circuit has simply ignored Pascoag's argument that the inverse condemnation claim did not accrue and was not ripe until 2001. That, to Pascoag, is the essence of futility. Put another way, both the First Circuit and the Rhode Island Supreme Court insist that Pascoag's inverse condemnation claim should have been brought years ago and utterly ignore Pascoag's argument that its claim did not accrue and was not ripe until the Rhode Island Supreme Court decided *Reitsma*. By so doing, both the First Circuit and the Rhode Island Supreme Court profess that Pascoag's federal rights, "in the constitutional sense," are coextensive with its rights under state law, even though *this* Court has made it clear that constitutional guarantees would be rendered meaningless if "our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights." *Bush v. Gore*, 531 U.S. 98, 115, 121 S.Ct. 525, 535 n.1 (2001)

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the First Circuit Court of Appeals.

Respectfully submitted,

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Dated: October 17, 2003

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337 F.3d 87

United States Court of Appeals,
First Circuit.

PASCOAG RESERVOIR & DAM, LLC,
Plaintiff-Appellant/Cross-Appellee,
v.
The State of RHODE ISLAND, acting by and through Jan Reitsma, in his capacity as Director of the Rhode Island Department of Environmental Management, and Sheldon Whitehouse, in his capacity as Attorney General for the State of Rhode Island, Defendants-Appellees/Cross-Appellants.

Nos. 02-2179, 02-2233.

Heard April 11, 2003.
Decided July 28, 2003.

Barry J. Kusinitz, for plaintiff-appellant/cross-appellee.

Michael Rubin, Assistant Attorney General, with whom Sheldon Whitehouse, Attorney General, James R. Lee, Assistant Attorney General Div. Chief for the State of Rhode Island, Claire Richards, Deputy Executive Counsel, and Mary Kay, Deputy Chief Legal Counsel, for the Rhode Island Department of Environmental Management, were on brief, for defendants-appellees/cross-appellants.

Before BOUDIN, Chief Judge, TORRUELLA and LIPEZ, Circuit Judges.

TORRUELLA, Circuit Judge.

Rhode Island, through its Department of Environmental Management, acquired an area of land in the Pascoag Reservoir ("Reservoir" or "Lake") by adverse possession and obtained a prescriptive easement on behalf

of the public to use the Reservoir for recreational activities. In this inverse condemnation suit,[1] Pascoag Reservoir & Dam, LLC ("Pascoag"), the Reservoir's owner, seeks compensation for that acquisition.

The district court dismissed the case for failure to state a claim. *Pascoag Reservoir & Dam, LLC v. Rhode Island,* 217 F.Supp.2d 206, 229 (D.R.I.2002) (hereinafter "*Pascoag Federal Decision*"). The court found that, as a general rule, the government must compensate for a taking made by adverse possession or prescription, but Pascoag may not recover in this case either because the statute of limitations began to run in 1975, when the state acquired its property rights, or because the doctrine of laches bars recovery. *Id.* at 226-29. The court then dismissed Pascoag's state law claims. *Id.* at 229.

The state appeals the first finding, asserting that adverse possession and prescription do not constitute a taking of property under the Constitution. Pascoag appeals the dismissal of its claim, arguing that the statute of limitations did not begin to run until the recent judicial determination that the state had acquired property rights in the Reservoir.

We agree with the district court that Pascoag failed to state a viable claim. Because Pascoag failed to timely

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[1] Inverse condemnation is " 'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.' " *United States v. Clarke,* 445 U.S. 253, 257, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980) (quoting D. Hagman, *Urban Planning and Land Development Control Law* 328 (1971)).

pursue its state remedies, it forfeited its federal claim. Following the "fundamental rule of judicial restraint," we do not reach the constitutional question of whether compensation is due when the state acquires land by adverse possession or prescription. *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 62, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) (Ginsburg, J., concurring in part and concurring in the judgment) (quotation omitted); *see also Kelly v. Marcantonio,* 187 F.3d 192, 197 (1st Cir.1999) (declaring "courts should not reach constitutional questions in advance of the necessity of deciding them").

I. Facts

Located in the towns of Burrillville and Glocester, Rhode Island, the Reservoir (also known as Echo Lake) is more than two miles long and has more than ten miles of shoreline. Pascoag's predecessor in title created the Lake in 1860; Pascoag has owned the Reservoir since 1983. In 1964, the state purchased a lot abutting the Reservoir and constructed a public boat ramp the following year.

Until at least 1997, "members of the public could . . . use the ramp as a point of access to the lake for various recreational activities, including boating and fishing." *Reitsma v. Pascoag Reservoir & Dam, LLC,* 774 A.2d 826, 829 (R.I.2001) (hereinafter "*Pascoag State Decision*") The Reservoir was enjoyed by "innumerable members of the public and other lakeside property owners." *Id.* In 1997, Pascoag sought to limit the public's use by placing a "NO TRESPASSING" sign near the water. *Id.*

In 1998, the state brought suit in state court asserting, among other things, that it had acquired property rights in the Reservoir. Pascoag cross-claimed, alleging

that the state's actions constituted a taking without just compensation, but the state courts did not decide the taking issue because Pascoag later voluntarily dismissed its inverse condemnation claim. In 2001, the Rhode Island Supreme Court held that the state had acquired by adverse possession a small portion of the Lake bottom (occupied by the boat ramp) and had acquired, on the public's behalf, a prescriptive easement to use the boat ramp to access the entire Lake for recreational purposes. *Id.* at 834. The court held "that the state had begun to use the Reservoir property in 1965 and, under the Rhode Island ten year adverse possession statute, had acquired title to a portion of the Reservoir plus an easement in 1975." *Pascoag Federal Decision,* 217 F.Supp.2d at 211 (citing *Pascoag State Decision,* 774 A.2d at 838). The issue in the state case was whether the state acquired land rights by adverse possession and prescription; the Rhode Island Supreme Court held that it did. *Pascoag State Decision,* 774 A.2d at 834.

Pascoag filed this complaint in federal court in October 2001, alleging that the state violated the Takings Clause of the Fifth and Fourteenth Amendments and asserting related state law claims. The district court, treating the claim as one arising under 42 U.S.C. § 1983, dismissed the suit, and this appeal followed.

II. Standard of Review

We review de novo the district court's dismissal for failure to state a claim under Fed.R.Civ.P. 12(b)(6). *Rockwell v. Cape Cod Hosp.,* 26 F.3d 254, 255 (1st Cir.1994). We accept the complaint's allegations as true and make all reasonable inferences in favor of the plaintiff. *Id.* We will

affirm the dismissal only if Pascoag cannot prove any facts entitling it to relief. *Id.*

III. Discussion

A. Prerequisites to a Takings Claim

In *Williamson County Regional Planning Commission v. Hamilton Bank,* the Supreme Court outlined two prerequisites to a federal suit alleging a Fifth Amendment taking of a property interest. 473 U.S. 172, 186, 194-95, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). A federal suit is not timely until a plaintiff demonstrates that (a) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," (the "final decision requirement") and (b) the plaintiff sought (and was denied) just compensation by means of an adequate state procedure (the "state action requirement").[2] *Id.* at 186, 194-95, 105 S.Ct. 3108. *Williamson County* stands "for the proposition that there is no uncompensated taking – that is, nothing to litigate under § 1983 – until the state has established (a) what it has taken, and (b) its refusal to pay 'just compensation.'" *SGB Fin. Servs., Inc. v. Consol. City of Indianapolis-Marion County, Ind.,* 235 F.3d 1036, 1038 (7th Cir.2000).

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[2] This case does not raise the issue of whether the *Williamson County* requirements apply when a litigant alleges that the state has taken property for a purely private use. *See Daniels v. Area Plan Comm'n,* 306 F.3d 445, 453 & n. 6 (7th Cir.2002) (identifying circuit split and citing cases).

Although *Williamson County* was a regulatory taking case, a modified verison of its timeliness analysis applies to physical taking cases. *Daniel v. County of Santa Barbara,* 288 F.3d 375, 382 (9th Cir.2002). The present case concerns a potential physical taking, based on the intrusion onto Pascoag's property or the acquisition of rights in that property.[3] In a physical taking case, the final decision requirement is relieved or assumed because "[w]here there has been a physical invasion, the taking occurs at once, and nothing the [governmental actor] can do or say after that point will change that fact." *Hall v. City of Santa Barbara,* 833 F.2d 1270, 1281 n. 28 (9th Cir.1987); *cf. Arnett v. Myers,* 281 F.3d 552, 563 (6th Cir.2002) (finding final decision requirement satisfied because decision maker "arrived at a definitive position inflicting an actual, concrete injury when its agents removed and destroyed" plaintiff's alleged property); *Forseth v. Village of Sussex,* 199 F.3d 363, 372 n. 12 (7th Cir.2000) (finding physical taking claim subject only to *Williamson County's* state action requirement). However, the state action requirement remains in physical taking cases: "[C]ompensation must first be sought from the state if adequate procedures are available." *Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 882 F.2d 1398, 1402 (9th Cir.1989), *overruled on other grounds by Armendariz v. Penman,* 75 F.3d 1311, 1326 (9th Cir.1996) (en banc).

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[3] Both the fee simple in the Lake bottom and the easement on behalf of the public are permanent physical occupations. *See Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 832, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

B. State Action Requirement

Here, if Rhode Island "provides an adequate process for obtaining compensation, and resort to that process holds out some realistic promise of yielding just compensation," Pascoag may not seek compensation in federal court for an alleged taking without first resorting to the state process. *Gilbert v. City of Cambridge,* 932 F.2d 51, 63 (1st Cir.1991); *accord Williamson County,* 473 U.S. at 195, 105 S.Ct. 3108 ("[I]f a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."). "'[B]ecause the Fifth Amendment[4] proscribes takings *without just compensation,* no constitutional violation occurs until just compensation has been denied.'" *Gilbert,* 932 F.2d at 63 (quoting *Williamson County,* 473 U.S. at 194 n. 13, 105 S.Ct. 3108); *accord Gamble v. Eau Claire County,* 5 F.3d 285, 286 (7th Cir.1993) (stating that a litigant must "exhaust[ ] his remedies for obtaining a compensation award or equivalent relief from the state" because "the right protected by the duty of just compensation is not to the land or its use but merely to the market value of what is taken"). Thus, "the state's action . . . is not 'complete' until the state fails to provide adequate compensation for the taking." *Williamson County,* 473 U.S. at 195, 105 S.Ct. 3108.

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[4] The Fifth Amendment provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. It applies to the states through the Fourteenth Amendment. *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 342 n. 1, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986).

Pascoag did not seek compensation through the state court. Pascoag's burden is to show that one of the narrow exceptions to the state action requirement applies. The Supreme Court in *Williamson County* identified two exceptions – where state remedies were "unavailable" or "inadequate." 473 U.S. at 196-97, 105 S.Ct. 3108; *accord Deniz v. Municipality of Guaynabo,* 285 F.3d 142, 146 (1st Cir.2002); *Gilbert,* 932 F.2d at 65. Some courts have also recognized an exception where state remedies are "futile." *See, e.g., Daniels,* 306 F.3d at 456.

1. Availability of adequate state remedies

First, we consider whether adequate state remedies were available to Pascoag. Courts have made exceptions to *Williamson County's* state action requirement when state law did not recognize the taking that occurred, or did not permit the relief required to make the plaintiff whole. *See, e.g., Daniels,* 306 F.3d at 456-57 (finding an exception to the state action requirement because plaintiffs did not have a "definable pecuniary loss" and state inverse condemnation proceedings were limited to monetary damages); *Hall,* 833 F.2d at 1281 n. 28 (finding a state court process inadequate because at the time, no action for inverse condemnation based on a regulatory taking could be brought under California law); *see also Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 734 n. 8, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997) ("Ordinarily, a plaintiff must seek compensation through state inverse condemnation proceedings before initiating a takings suit in federal court, unless the state does not provide adequate remedies for obtaining compensation.").

Pascoag cannot show that Rhode Island's remedies were inadequate or unavailable. The Rhode Island Constitution prohibits the taking of private property for public use without just compensation and Rhode Island state courts have long allowed recovery through suits for inverse condemnation. *Annicelli v. Town of South Kingstown,* 463 A.2d 133, 139 (R.I.1983); *E & J Inc. v. Redevelopment Agency of Woonsocket,* 122 R.I. 288, 405 A.2d 1187, 1189 (1979) ("Governmental action short of actual acquisition of property may be a constructive taking or an inverse condemnation . . . ."); *cf. Caldarone v. Rhode Island,* 98 R.I. 7, 199 A.2d 303, 304 (1964) (assessing damages for land taken by state); *see also Harris v. Mo. Conservation Comm'n,* 790 F.2d 678, 680-81 (8th Cir.1986) (finding constitutional provision provided adequate remedy). Thus, Rhode Island has an adequate process available to address Pascoag's suit for just compensation.

2. *Futility of pursuing state remedies*[5]

In its decision regarding the property rights of the state and Pascoag, the Rhode Island Supreme Court discussed Pascoag's potential takings claims in dicta:

> [E]ven if the state's conduct from 1965 to 1975 had been unlawful and amounted to an improper taking of the lake owner's property without

[5] We recognized a futility exception to *Williamson County's* final decision requirement where "the granting authority has dug in its heels and made it transparently clear that the permit, application or no, will not be forthcoming." *Gilbert,* 932 F.2d at 61 (citation omitted). A futility exception to the state action requirement would exist under similar circumstances.

> paying just compensation, and even if the lake owner's property had not been taken in the constitutional sense until the prescriptive period ended in 1975 – issues that we have no need to decide in this case – the corporation and its predecessors failed to assert any takings claim in a timely manner. Thus, they are barred from asserting them now under any statute of limitations that possibly could apply to such claims. . . .

Pascoag State Decision, 774 A.2d at 838. Pascoag argues that because this language suggests that Pascoag's claim is time-barred, state court remedies are futile.

Again, Pascoag fails to carry its burden to show that an exception to the state action requirement applies. Pascoag's futility argument is simply that it is now time-barred from making state law claims. If the futility rule were read this broadly it would swallow the general rule of state remedy exhaustion. Like the other exceptions, the futility exception must consider the landowner's available state remedies at the time of the taking. *See Williamson County,* 473 U.S. at 194, 105 S.Ct. 3108 ("[A]ll that is required [by the Fifth Amendment] is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking.") (quotation omitted). There is no evidence that the state would not have been receptive to Pascoag's claim had it been brought at the time the property was taken (regardless of whether that was in 1965 or 1975 – a determination we address below). Pascoag offers no compelling explanation for not using state

procedures earlier,[6] and we find that state court remedies are not futile.

C. Consequences of Failure to Bring a Timely State Claim

Pascoag did not satisfy the *Williamson County* prerequisites for a federal claim. We have stated that takings claims are "unripe until the potential state remedy has been more fully pursued."[7] *Gilbert,* 932 F.2d at 65. The situation here is different. As the Rhode Island Supreme Court noted, there is a fatal flaw in Pascoag's claim: it is

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[6] Because Pascoag's federal claim has been forfeited, we need not address the issue of whether Pascoag, who became the owner of the Reservoir in 1983, has a right to compensation. *See Palazzolo v. Rhode Island,* 533 U.S. 606, 628, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) (noting that in a physical taking case, "it is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser.").

[7] The term "ripe" is confusing because, as explained infra, a plaintiff is *barred* from bringing federal suit in a situation such as Pascoag's, where the state statute of limitations has run. Ripeness terminology suggests that a claim will later be available to the plaintiff; such language has been avoided in some recent cases. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 721, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) ("A federal court, moreover, cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy."); *Harbours Pointe of Nashotah, LLC v. Village of Nashotah,* 278 F.3d 701, 704 (7th Cir.2002) (noting that a plaintiff "cannot state a claim under federal law until he has used those [state] procedures and been denied compensation."); *but see Palazzolo,* 533 U.S. at 618, 121 S.Ct. 2448 (using "ripeness" to explain *Williamson County's* requirements in the regulatory taking context). We, too, avoid terms of ripeness because the *Williamson County* requirements may reveal the claim to be either unripe (too early) or overripe (too late).

too late for any state law cause of action. *Williamson County* requires the pursuit of state remedies before a taking case is heard in federal court. Adequate state remedies were available to Pascoag; it simply ignored those remedies until it was too late. By failing to bring a timely state cause of action, Pascoag forfeited its federal claim.

We assume for purposes of this appeal that a taking claim may arise when the government acquires property rights by adverse possession or prescription. Reviewing the dates as determined by the Rhode Island Supreme Court, the state and the public began using the land and water in a manner that was open, actual, notorious, hostile, adverse, continuous, and under a claim of right in 1965. *Pascoag State Decision,* 774 A.2d at 834. Property rights were acquired by the state and the public in 1975. *Id.* at 838. The state court decision was issued in 2001.

Relying on *United States v. Dickinson,* 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947), Pascoag argues that the circumstances surrounding the taking had not "stabilized" until the Rhode Island Supreme Court's final decision, and the statute of limitations did not begin to run until that time. *See id.* at 749, 67 S.Ct. 1382. We find *Dickinson* distinguishable. There, the government caused plaintiff's land to be flooded, and the water level rose over a period of years. *Id.* at 747, 67 S.Ct. 1382. The government did not use condemnation proceedings, but "left the taking to physical events." *Id.* at 748, 67 S.Ct. 1382. The Court held that the statute of limitations did not begin to run when flooding commenced, but only when physical events stabilized, *Id.* at 749, 67 S.Ct. 1382. This ensured that damages could be ascertained and that res judicata would not bar recovery for future damage. *Id.*

While Pascoag points to facts suggesting that the situation regarding ownership of the Reservoir was not certain as late as 1997, the State Supreme Court found that the State's use satisfied all the adverse possession requirements by 1975. At that time a final account could be struck, and nothing in the State's use of the Lake changed over time, so piecemeal litigation would not result. There was continuous occupancy by the State for ten years at which point property rights were acquired by operation of law and, if compensable, must be countered by a state court suit within the period allowed by the state statute of limitations.

Pascoag also asserts that its claim was not ripe until the decision of the Rhode Island Supreme Court. We disagree. First, Pascoag's argument is at odds with the state court's finding of adverse possession and prescription, which is binding on Pascoag and requires open and notorious possession by the adverse party. That determination means, assuming arguendo that a taking claim could be made for acquisition by adverse possession or prescription, Pascoag should have known that a taking was in progress and brought suit under state law at that time (within the relevant statute of limitations).[8] The statute of limitations for a state taking claim is, at most, 10 years (for "all civil actions not otherwise limited"), and

[8] What remedies did Pascoag have available to it? From 1965 to 1975, before adverse possession and prescription transferred title, Pascoag could have brought a suit to evict the state from the land or, alternatively, should have demanded that the state agree in writing that occupancy was not intended to be adverse but was by temporary and revocable permission. This may seem harsh but adverse possession law puts this burden on all landowners as to all occupants.

likely 1 year (for "assessment of damages in state condemnation proceedings"). R.I. Gen. Laws § 9-1-36 (2002). Pascoag's claim was ripe under state law at least by 1975, when Pascoag, assuming it had any claim at all, could have brought suit for recovery in state proceedings. If it had done so and the state had denied a remedy in violation of the Constitution, then a § 1983 claim would have ripened at the time of the denial. To its detriment, Pascoag did not file suit, but instead waited until the state sought judicial remedies in 1998.

Second, while the *Williamson County* requirements typically reveal a claim to be premature, they may also reveal that a claim is barred from the federal forum. *See Vandor, Inc. v. Militello,* 301 F.3d 37, 39 (2d Cir.2002); *Harbours Pointe,* 278 F.3d at 706; *Gamble,* 5 F.3d at 286; *Harris,* 790 F.2d at 681. The *Williamson County* "ripeness" requirements will never be met in this case, because the state statute of limitations has run on Pascoag's inverse condemnation claim. By failing to bring its state claim within the statute of limitations period, Pascoag *forfeited* its federal claim. *Gamble,* 5 F.3d at 286; *accord Vandor,* 301 F.3d at 39. "The state provided a remedy, but plaintiff[ ] failed to pursue it. [It] cannot obtain jurisdiction in the federal courts simply by waiting until the statute of limitation bars the state remedies." *Harris,* 790 F.2d at 681.

In *Gamble,* the plaintiff filed suit in federal court alleging that she had been denied just compensation by a zoning plan. *Gamble,* 5 F.3d at 285. The Seventh Circuit, citing *Williamson County,* asked whether she had exhausted her remedies "for obtaining a compensation award or equivalent relief from the state." *Id.* at 286. Among the options available to the plaintiff under state law was the

ability to bring an inverse condemnation suit. *Id.* However, the statute of limitations barred plaintiff from raising that issue in the state courts. *Id.* Analogizing to other situations where exhaustion of remedies is required, the court held that the failure to pursue state compensation remedies in a timely fashion forfeited plaintiff's federal claim to just compensation. *Id.*

Similarly, Pascoag's failure to bring a timely suit for compensation under state law has led to the forfeiture of its federal taking claim. Even making all reasonable inferences in favor of Pascoag – that a taking claim can stand when the state acquires land by adverse possession, that the claim did not accrue until the state assumed property rights in 1975, and that the Rhode Island statute of limitations for such a claim is 10 years – Pascoag's state claim was time-barred in 1985. "[A] claimant cannot be permitted to let the time for seeking a state remedy pass without doing anything to obtain it and then proceed in federal court on the basis that no state remedies are open." *Id.* Pascoag's failure to assert a timely state claim has foreclosed its federal cause of action. "Litigants who neglect or disdain their state remedies are out of court, period." *River Park, Inc. v. City of Highland Park,* 23 F.3d 164, 165 (7th Cir.1994).

IV. Conclusion

To sum up, a taking by adverse possession occurred, on Pascoag's own theory, in 1975 after a ten-year period of government occupancy or use. At that point, Pascoag had an obligation to bring a suit in state court for compensation within the limitations period unless the state remedy was plainly futile (which in this case it was not); and by

failing to do so it forfeited any federal claim that state processes were inadequate. Of course, the situation in 1975 may well have been unclear from a legal standpoint, but for that, Pascoag's remedy was to bring a lawsuit within the statutory period. The question of whether or not the state must pay when it takes land by adverse possession or prescription will have to wait for another day. Because Pascoag failed to bring a timely claim in state court, it forfeited its federal takings claim. The district court's decision is affirmed.

Affirmed.

217 F.Supp.2d 206

PASCOAG RESERVOIR & DAM, LLC, Plaintiff,

v.

The State of RHODE ISLAND, acting by and through Jan Reitsma, in his capacity as Director of the Rhode Island Department of Environmental Management and Sheldon Whitehouse, in his capacity as Attorney General for the State of Rhode Island, Defendants.

No. C.A. 01-505L.

United States District Court,
D. Rhode Island.

Aug. 20, 2002.

Barry J. Kusinitz, Providence, RI, for plaintiff.

James R. Lee, Attorney's Office, Mary E. Kay, R.I. Department of Environmental Management, Office of Legal Services, Claire J.V. Richards, Office of the Governor, Providence, RI, for defendant.

OPINION AND ORDER

LAGUEUX, Senior District Judge.

This lawsuit is the latest chapter in a contentious dispute between the State of Rhode Island ("State") through the Department of Environmental Management ("DEM") and Pascoag Reservoir & Dam, LLC ("Pascoag"). Plaintiff, Pascoag, claims that the State has engaged in a taking of its property, and that the United States and

Rhode Island Constitutions mandate that compensation be paid to it for that property.[1] The taking of property, Pascoag alleges, was the acquisition of a portion of the Reservoir bottom by adverse possession and the acquisition of use of the Reservoir by prescriptive easement. The State has moved to dismiss the complaint, claiming that, as a matter of law, when a state acquires property by adverse possession or prescription that does not constitute a taking. The State also argues that any lawsuit based on a constitutional takings argument is barred by the statute of limitations.

The dispute places this Court at a curious juncture between property law and constitutional law. In property law, it is a straightforward proposition that, under certain conditions, title to property may, by operation of law, be transferred to another without compensation. In constitutional law, it is a straightforward proposition that the government cannot take private property without just compensation. This Court must determine how these two propositions interact with each other. Although defendant contends that the two areas of law are "mutually exclusive," they are not. Any state statute must adhere to the requirements of the United States Constitution. In this case, the Court concludes that plaintiff has alleged a takings claim against the State of Rhode Island. Since the Court holds that the taking occurred in 1975, plaintiff's claim, asserted twenty-six years after the taking, is too stale to warrant prosecution. Therefore, plaintiff's federal takings claim is dismissed. Plaintiff's remaining state law

[1] Although the complaint does not so state, the Court treats this action as though plaintiff brings it pursuant to 42 U.S.C. § 1983.

claims are also dismissed but without prejudice because this Court declines to exercise supplemental jurisdiction over those state claims.

ISSUES PRESENTED

This complaint was filed in this Federal District Court on October 18, 2001. The complaint asserts four claims against the State. Count I alleges that the State has violated the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution. Count II alleges that the State has violated the Takings Clause of the Rhode Island Constitution. Count III seeks a declaratory ruling that the State is responsible for the repair, maintenance, and upkeep of the Pascoag Reservoir and dam. Count IV seeks reimbursement for any local taxes and assessments paid to the Towns of Burrillville and Glocester, and any local fire districts. With the exception of Count I, plaintiff's claims are based on state law. Defendant has moved to dismiss the whole complaint for failure to state a claim upon which relief can be granted.

JURISDICTION

As plaintiff has alleged a constitutional violation in Count I, this Court's jurisdiction is based on the federal question raised in the complaint. 28 U.S.C. § 1331. The constitutional violation stems from the Fifth and Fourteenth Amendments to the U.S. Constitution. 28 U.S.C. §§ 2201, 2202 provides a form of relief, declaratory judgment, for such violations. Because plaintiff seeks damages for a violation of a constitutional right, the Court treats this action as brought pursuant to 42 U.S.C. § 1983. As the remaining counts are state law claims, this Court has

supplemental jurisdiction pursuant to 28 U.S.C. § 1367 to consider such matters.

STANDARD OF REVIEW FOR RULE 12(b)(6) MOTION TO DISMISS

In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the Court construes the complaint in the light most favorable to plaintiff, taking all well-pleaded allegations as true and giving plaintiff the benefit of all reasonable inferences. Fed.R.Civ.P. 12(b)(6); *Correa-Martinez v. Arrillaga-Belendez,* 903 F.2d 49, 52 (1st Cir.1990). Because a 12(b)(6) motion often comes in the early stages of the litigation, dismissal under Rule 12(b)(6) is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Judge v. City of Lowell,* 160 F.3d 67, 72 (1st Cir.1998) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

In a Rule 12(b)(6) motion, the Court generally may examine only the pleading itself. In a notice pleading system, the pleading serves to inform defendant of the claims made against him or her. *Langadinos,* 199 F.3d at 72-73. The Court need not accept unsupported conclusions or interpretations of law. *Washington Legal Found. v. Massachusetts Bar Found.,* 993 F.2d 962, 971 (1st Cir.1993). If the pleading fails to make out a legal claim upon which relief can be granted or fails to allege any facts that would support a legal claim, the pleading is insufficient and should be dismissed. *See Correa-Martinez,* 903 F.2d at 52-53.

BACKGROUND AND FACTS

A. *Facts as Plaintiff Alleges*

The complaint alleges the following facts. Pascoag is the owner of record of the Pascoag Reservoir ("Reservoir"). The Reservoir is located in the Towns of Burrillville and Glocester, Rhode Island. The Reservoir is a man-made body of water consisting of approximately 350 acres, originally created in 1860 by various riparian mill owners as a source of power for their mills. Plaintiff's predecessors in title have been the Pascoag Reservoir Association, the Pascoag Reservoir Corporation, and the Pascoag Investment Corporation. In 1965, the State constructed a boat ramp into the Reservoir. In 1995, title to the Reservoir in fee simple was conveyed to plaintiff. Intermittently, between 1987 and 1997 the State unsuccessfully negotiated to buy the Reservoir. In 1997, DEM notified Pascoag in writing that the State had acquired an interest in the Reservoir by adverse possession or prescription. DEM then filed suit in Rhode Island Superior Court to enforce its claim.

B. *Determinations of State Law*

On June 20, 2001, the Rhode Island Supreme Court held that the State had acquired portions of the Reservoir bottom by adverse possession [2] and had acquired, on behalf of the public, a prescriptive easement to use the boat ramp to obtain access to the Reservoir for recreational purposes.

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[2] The portion of the Reservoir bottom that the State adversely possessed is the portion that lies under the part of the boat ramp that extends into the Reservoir.

Reitsma v. Pascoag Reservoir & Dam, LLC, 774 A.2d 826, 838 (R.I.2001)(3-2) (overruling the trial court). The effect of that decision, and particularly the finding of a public easement by prescription, is to prevent the drainage or alteration of the Reservoir by plaintiff and to allow the public continuous access to the Reservoir for recreational use. The Supreme Court held that the State had begun to use the Reservoir property in 1965 and, under the Rhode Island ten year adverse possession statute, had acquired title to a portion of the Reservoir plus an easement in 1975. *Id.*

C. *Adverse Possession and Easement by Prescription*

Adverse possession and prescriptive easements are creatures of state law, not federal law. Chapter 7 of Title 34 of the Rhode Island General Laws sets forth the statutory definition of adverse possession and prescription.[3] Adverse possession is a method of transferring title in fee

[3] "Conclusive title by peaceful possession under claim of title. – Where any person or persons, or others from whom he, she or they derive their title, either by themselves, tenants, or lessees, shall have been for the space of ten (10) years in the uninterrupted, quiet, peaceful and actual seisin and possession of any lands, tenements or hereditaments for and during that time, claiming the same as his, her or their proper, sole and rightful estate in fee simple, the actual seisin and possession shall be allowed to give and make a good and rightful title to the person or persons, their heirs and assigns forever; and any plaintiff suing for the recovery of any such lands may rely upon the possession as a conclusive title thereto, and this chapter being pleaded in bar to any action that shall be brought for the lands, tenements or hereditaments and the actual seisin and possession being duly proved, shall be allowed to be good, valid and effectual in law for barring the action." R.I. Gen. Laws § 34-7-1.

simple of a portion of real property. Certain conditions must be maintained over a period of time set by statute. R.I. Gen. Laws § 34-7-1. In Rhode Island, to complete a transfer of title by adverse possession, the claimant's possession must be actual, open, notorious, hostile, under claim of right, continuous, and exclusive. *DelSesto v. Lewis,* 754 A.2d 91, 94-95 (R.I. 2000). The possession must be over ten years, the statutory period for adverse possession. R.I. Gen. Laws § 34-7-1. Similarly, prescription is a method of creating an easement by comparable criteria as adverse possession. The creation of an easement by prescription is the creation of a right to use and title to use that cannot be revoked. *Greenwood v. Rahill,* 122 R.I. 759, 412 A.2d 228, 230 (1980) ("Once the state had acquired a prescriptive easement . . ., no act of plaintiffs could divest the state of that right since such an easement conveys a good and rightful title forever.").

Adverse possession is an ancient English common law doctrine to clarify title in land. Tiffany Real Property § 1133 (3d ed.1975). The defense of adverse possession acted as a bar to ejectment actions. Although various forms of adverse possession appeared in English law as early as 1100 A.D., the current form of adverse possession-a fixed number of years operating as a statute of limitation against claims to land-was adopted by the Statute of James in 1623. *Id.* After a certain period of time, claims to land can no longer be asserted, thus preventing "illegal claims after the evidence necessary to defeat them has been lost" and advancing the community's interest in "the security of title." *Id.* at § 1134. Furthermore, adverse possession discourages record owners from "sleeping on their rights" by neglecting to take the appropriate legal steps to maintain their possession. *See id.*

An easement is a right to use another's property in a certain manner that simultaneously acts as a limitation on that other person's ability to use his or her property in an unrestricted manner. II American Law of Property § 8.4 (1952). It is a property right against the subjected land as well as all other parties. *Id.* at § 8.5. It cannot be terminated by the possessor of the land subject to it. *Id.* at § 8.14. An appurtenat easement is an easement that is tied to a specific parcel of land and is not a personal right. Tiffany Real Property § 1193. The easement benefits that land and the possessor's use and enjoyment of that land. Here, the easement is appurtenant to the parcel of land that was adversely possessed by the State. One can only acquire a prescriptive right over something that could otherwise be granted. Therefore, for example, one cannot acquire by prescription rights to land held in public trust because such rights can never be granted by the State. *Id.* at § 1192.

Under Rhode Island law, the State may acquire title by adverse possession or prescription. *Reitsma,* 774 A.2d at 838 (state acquires title by adverse possession and easement by prescription); *Greenwood,* 412 A.2d at 230 (state acquires easement by prescription). Additionally, the United States Supreme Court has held that officers of the United States, sued for trespass, may raise a defense of lawful title by adverse possession. *Stanley v. Schwalby,* 147 U.S. 508, 519, 13 S.Ct. 418, 37 L.Ed. 259 (1893).

PRELIMINARY MATTERS

As a preliminary matter, this Court must define the narrow scope of the legal issue that this Court may consider. Additionally, the Court must resolve some

affirmative defenses alluded to by defendant. Defendant argues that the doctrine of res judicata bars plaintiff from pursuing this action because the takings issue and the statute of limitations issue were determined by the Rhode Island Supreme Court. At the hearing on this motion, defendant also argued that the Rooker-Feldman doctrine prohibits this federal court from reviewing the state court decision. Plaintiff argues that the takings issue was never properly before the Rhode Island Supreme Court, and that any statements made on the takings issue by the Rhode Island Supreme Court should be disregarded as dicta. In addition, as a jurisdictional prerequisite, this Court must determine if this issue is ripe for a federal court's consideration.

A. *Conclusions of State Law*

This Court cannot revisit the conclusion of the Rhode Island State Supreme Court on an issue of state law. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."). A state Supreme Court has the final word on what constitutes adverse possession or easement by prescription. *See id.* The precise issue of adverse possession and prescription in this case has been litigated and determined by the Supreme Court of Rhode Island. *Reitsma,* 774 A.2d at 838. Principles of res judicata apply. This Court cannot revisit the Rhode Island Supreme Court's holding that the State acquired title in fee simple by adverse possession and an easement by prescription. This Court can only address the consequences of the State acquiring title to a piece of land

by adverse possession and an easement by prescription. *See Erie R.R. Co.,* 304 U.S. at 78, 58 S.Ct. 817.

B. *Claim Preclusion*

The doctrine of res judicata is a bar to a party litigating anew issues that have already been decided by a court. Defendant argues that plaintiff is precluded from litigating the takings claim because it was raised in a prior state court proceeding. Res judicata is a term that applies to two types of preclusion, claim preclusion and issue preclusion. *Liu v. Striuli,* 36 F.Supp.2d 452, 470-71 (D.R.I.1999). When a federal court examines whether a state court decision has a preclusive effect, the federal court must use the same law that a state court would employ in making such a determination. *Texaco Puerto Rico, Inc. v. Medina,* 834 F.2d 242, 245 (1st Cir.1987). Therefore, this Court must apply state law to determine if res judicata applies. *See id.*

Claim preclusion acts as a bar to plaintiff taking a second bite at the apple through subsequent litigation. *ElGabri v. Lekas,* 681 A.2d 271, 276 (R.I.1996) (adopting Restatement (2d) of Judgments § 24). Claim preclusion encourages finality and consistency in judicial rulings. The Restatement sets forth the requirements for claim preclusion: "When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Restatement (2d) of Judgments § 24(1). In this case, the

State is seeking to bar plaintiff from relitigating an issue that it raised as a counterclaim in state court.

Claim preclusion does not apply when a court reserves a party's right to maintain a second action, as happens when a court dismisses a claim without prejudice. "When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant: . . . (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action." Restatement (2d) of Judgments § 26(1)(b).[4] Here, the state trial court dismissed Pascoag's takings counterclaim without prejudice. *Reitsma,* 774 A.2d at 837. Pascoag notified the state court that it was preserving the issue for subsequent action and, thus, avoided the effects of claim preclusion. *See* Restatement (2d) on Judgments § 26(1)(b); *see also Lovely v. Laliberte,* 498 F.2d 1261, 1264 (1st Cir.1974).

Additionally, there was no final judgment on the merits as to Pascoag's takings claim. No court entered a judgment on the takings claim. *See Pure Distributors, Inc. v. Baker,* 285 F.3d 150, 156-57 (1st Cir.2002) (discussing the finality requirement). Pascoag raised the claim before the state court, but, as the Rhode Island Supreme Court

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[4] Following this section of the Restatement, the comments elaborate on the notion of a court expressly reserving the right to maintain a second action. "A determination by the court that its judgment is 'without prejudice' (or words to that effect) to a second action on the omitted part of the claim, expressed in the judgment itself, or in the findings of fact, conclusions of law, opinion, or similar record, unless reserved or set aside, should ordinarily be given effect in the second action." Restatement (2d) on Judgments § 26(1)(b) cmt. b.

noted in *Reitsma,* Pascoag's takings claim was dismissed without prejudice. 774 A.2d at 837. The Rhode Island Supreme Court does speculate that any takings claim would be barred by the statute of limitations. *Id.* at 838. Since that issue was not properly before the Court, however, any dicta on the takings issue is not a final judgment on the merits. *See Pure Distributors, Inc.,* 285 F.3d at 156-57. Claim preclusion does not bar this lawsuit.

C. *Issue Preclusion*

Defendant additionally argues that issue preclusion prevents Pascoag from revisiting a determination that the statute of limitations bars plaintiff's takings claim. The Rhode Island Supreme Court adopted the following requirements for issue preclusion or collateral estoppel to apply: "(1) that there must be an identity of issues, (2) that the prior proceeding resulted in a final judgment on the merits, and (3) that the party against whom collateral estoppel is asserted is the same as or is in privity with a party in the prior proceeding." *State v. Jenkins,* 673 A.2d 1094, 1096 (R.I.1996). For an identity of issues to exist, "(1) the issue sought to be precluded must be identical to the issue determined in the earlier proceeding, (2) the issue must actually have been litigated in the prior proceeding, and (3) the issue must necessarily have been decided." *E.W. Audet & Sons, Inc. v. Firemen's Fund Ins. Co.,* 635 A.2d 1181, 1186 (R.I.1994).

As discussed supra, the statements made by the Rhode Island Supreme Court about the takings claim, including any statements concerning the statute of limitations, are not part of a final judgment and are not essential to that Court's judgment as the matter was not

properly before that Court. Therefore, the issue was not actually litigated nor was it decided. *See id.* Issue preclusion does not bar plaintiff's takings claim in this case.[5]

D. *Rooker-Feldman Doctrine*

The Rooker-Feldman doctrine is a basic principle of subject matter jurisdiction that federal district courts should not serve as appellate courts to state courts. *See, e.g., Wilson v. Shumway,* 264 F.3d 120, 123-26 (1st Cir.2001) (discussing the Rooker Feldman Doctrine). The only appropriate federal appellate court to a state court is the United States Supreme Court. *Id.* at 123; *see also Keating v. Rhode Island,* 785 F.Supp. 1094, 1098 (D.R.I.1992). Therefore, a federal district court should not review issues already determined by a state court. Even if the claim was not presented to a state court, the Rooker Feldman doctrine "forecloses lower federal court jurisdiction over claims that are 'inextricably intertwined' with the claims adjudicated in a state court." *Picard v. Members of the Employee Ret. Bd.,* 275 F.3d 139, 145 (1st Cir.2001) (quoting *Sheehan v. Marr,* 207 F.3d 35, 39-40 (1st Cir.2000)). "Inextricably intertwined" is defined as a situation where the federal claim can only succeed if the state court claim fails. *Id.* In other words, the federal court

[5] This Court notes that Rhode Island Supreme Court decisions on collateral estoppel or issue preclusion only discuss issue preclusion as it relates to questions of fact, not questions of law. *See, e.g., Jenkins,* 673 A.2d at 1096; *Audet* 635 A.2d at 1186. The Restatement (2d) of Judgments, on the other hand, discusses issue preclusion in the context of both issues of fact and law. Restatement (2d) of Judgments § 27. The applicable statute of limitations period is, of course, a question of law.

would have to reverse the state court for the federal claim to prevail. *Id.*

Here, the Rooker Feldman doctrine is not a bar to this litigation. *See id.* For the takings claim to succeed it is not necessary to reverse any part of the state court's decision. *See id.* It is precisely the issue of whether adverse possession or prescription constitutes a taking that Pascoag seeks to litigate here. If the state court's decision on the adverse possession and easement by prescription issue were to be reversed, plaintiff's takings claim could not be before this Court. *See id.* Plaintiff would be in possession of all of the property in question. The two claims, therefore, are not inextricably intertwined, and the Rooker-Feldman doctrine does not apply. *See id.* Furthermore, as the Rhode Island courts did not fully adjudicate and determine the question, the United States Supreme Court would not be able to review the decision made in *Reitsma* because that issue would not be ripe for Supreme Court review. *See, e.g., Yee v. City of Escondido,* 503 U.S. 519, 537-38, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) (declining to review a regulatory takings claim for lack of ripeness).

E. *Ripeness Doctrine*

In the State's unwavering determination to argue that plaintiff's claims are stale or that the dispute has already been decided, the State ignores the argument that the claim may be premature. The United States Supreme Court has set forth certain ripeness requirements for a takings claim to be brought in federal court. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

If a case is not "ripe", then this Court generally lacks jurisdiction over the matter. *Faerber v. City of Newport,* 51 F.Supp.2d 115, 124 (D.R.I.1999). If the dispute is not ripe, then the Court would be engaged in abstract disagreements over matters that "may not occur as anticipated or may not occur at all." *Id.* (quoting *Riva v. Massachusetts,* 61 F.3d 1003, 1009 (1st Cir.1995)). Thus, the Court would be rendering a mere advisory opinion. Such advisory opinions are prohibited by Article III of the United States Constitution which requires federal courts to hear actual cases and controversies. *Ernst & Young v. Depositors Econ. Prot. Corp.,* 45 F.3d 530, 535 (1st Cir.1995). Because ripeness is part of the jurisdictional prerequisite for review, this Court is compelled to discuss the ripeness doctrine as it pertains to the Takings Clause of the Constitution despite the fact that defendant did not raise or brief the issue. *See* Fed.R.Civ.P. 12(h)(3) (Court must dismiss action sua sponte for lack of subject matter jurisdiction). Plaintiff did, however, make an anticipatory argument in its objection to the motion to dismiss.

In *Williamson,* the Supreme Court set forth two requirements before a takings claim is ripe for federal court review. 473 U.S. at 186, 105 S.Ct. 3108. First, a party must obtain a final decision regarding the property interest. *Id.* Second, a party must utilize the state procedures for obtaining just compensation. *Id.* If those two requirements are not met, the takings claim is not ripe for review. *Id.* The first prong of the *Williamson* ripeness test is satisfied. The Rhode Island Supreme Court issued a final decision regarding the property right. *Reitsma,* 774 A.2d at 838. The second prong of the test, whether the state procedures for compensation have been utilized, is not as straightforward. *See Williamson,* 473 U.S. at 194,

105 S.Ct. 3108. The state procedures must be utilized because the Constitution does not prohibit the state from taking property, it only prohibits the state from taking property and not paying just compensation. *Id.* at 194-95, 105 S.Ct. 3108.

If compensation is paid, even at a date after the taking of the property, then there is no violation of the Constitution and no dispute for the Court to resolve. *See id.* at 195, 105 S.Ct. 3108. If the state lacks procedures, or its procedures are inadequate, then the takings claim would be ripe for review in federal court. *See id.* at 197, 105 S.Ct. 3108; *McKenzie v. City of White Hall,* 112 F.3d 313, 317 (8th Cir.1997) (noting that plaintiff had failed to establish that a state inverse condemnation action would be futile). State procedures would be inadequate when the state's highest court denies that compensation could be available for the government's action that affected a property interest. *See First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 312 n. 6, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

The situation presented here is unlike the scenario this Court faced in *Q.C. Const. Co. Inc. v. Verrengia,* 700 F.Supp. 86, 90 (D.R.I.1988). There, plaintiff had failed to establish that the state supreme court would refuse to acknowledge that inverse condemnation could be determined to be a taking and provide compensation. *Id.* This Court noted that although the Rhode Island Supreme Court had not determined that a person could seek compensation for an inverse condemnation claim under state law, that Court had similarly not ruled that such a claim for compensation would not be allowed. *Id.* The Court distinguished that situation from the facts presented in *First English* where "plaintiff had been

effectively denied compensation by the highest state court." *Id.* Because plaintiffs there had not attempted to seek compensation in state court, the claim was premature. *Id.* at 91; *see also Deniz v. Municipality of Guaynabo,* 285 F.3d 142, 147 (1st Cir.2002) (dismissing takings claim filed in federal court on ripeness grounds when question of whether compensation was available had not been decided by the state's highest court).

Plaintiff argues that if an effort to obtain compensation from the State would be futile or otherwise unavailable, the ripeness requirement is satisfied. Plaintiff contends that because the State did not take property until the Rhode Island Supreme Court issued its ruling, it could not have sought compensation prior to that ruling. Additionally, plaintiff contends that because that ruling contains dicta that the State engaged in no taking of property, any effort to seek compensation under state procedures would be futile. Because further proceedings at the state level would be futile, plaintiff argues, the claim is ripe for review here in federal court.

Although plaintiff initially sought compensation in the Rhode Island state court system, the claim was dismissed without prejudice. *Reitsma,* 774 A.2d at 837. Subsequent to that dismissal, the Rhode Island Supreme Court intimated that when a state acquires property by adverse possession or an easement by prescription, the record owner has no cognizable takings claim. *Id.* at 837-38 (noting that even if a takings claim existed here, it would be time-barred). Thus, the Rhode Island Supreme Court has effectively barred any avenue for plaintiff to secure compensation in state court. *See id.* If the state has no procedures by which a party can seek compensation as a post-depravation remedy, the second prong of *Williamson*

is satisfied and the case is ripe for review by a federal court. *See* 473 U.S. at 197, 105 S.Ct. 3108; *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) ("A federal court, moreover, cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate post-deprivation remedy.").

THE FEDERAL TAKINGS CLAIM

Plaintiff alleges that the State, when it acquired an easement by prescription and a portion of the Reservoir bottom by adverse possession, violated plaintiff's rights under the Takings Clause of the Fifth and Fourteenth amendments of the United States Constitution. Defendant moves to dismiss arguing that, as a matter of law, when the State acquires title by adverse possession and/or an easement by prescription, the State is not subject to the Takings Clause.

Therefore, the primary question before this Court is whether the acquisition of property interests by a state through adverse possession and prescription is subject to the Takings Clause of the United States Constitution. No federal court has addressed this question before. Several state courts, however, have discussed this issue. This Court notes at the onset that plaintiff is not challenging the State's ability to acquire title to property by adverse possession or prescription. As a matter of state law, the Rhode Island Supreme Court has determined that the state may acquire title to property in this manner. *Reitsma,* 774 A.2d at 838. This Court must only determine if just compensation is payable. As this is a motion to dismiss at the preliminary stages of litigation, the Court

can only determine if plaintiff has alleged a sufficient takings claim in its complaint to warrant further proceedings.

A. *Federal Takings Clause*

The Fifth Amendment of the Constitution states that "private property shall not be taken for public use, without just compensation." U.S. Const. amend. V. The Fifth Amendment applies to the Federal Government. The Fourteenth Amendment, which applies to the states, does not contain the same Takings Clause; the Due Process Clause therein differs in that it does not mention just compensation. U.S. Const. amend. XIV. Nevertheless, the Takings Clause of the Fifth Amendment has been incorporated into the Fourteenth Amendment. *Chicago, B & Q. R.R. Co. v. City of Chicago,* 166 U.S. 226, 241, 17 S.Ct. 581, 41 L.Ed. 979 (1897). Therefore, the Takings Clause via incorporation applies to the states. *See id.*

The Takings Clause generally has been held to apply to two types of governmental action: the taking of property by the government's eminent domain power and the taking of property by inverse condemnation. The power of eminent domain is an inherent sovereign power. *See* Tiffany Real Property § 1252. Eminent domain allows the government to take private property, for the benefit of the public, when compensation is paid. *Id.* Inverse condemnation occurs when government regulation, in effect, condemns some or all of the use of the property, diminishing the value to its owners to such an extent that it is as if the government had condemned the property. As Justice Oliver Wendell Holmes wrote eighty years ago in a seminal takings case: "The general rule at least is, that while

property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922). Inverse condemnation thus leads to the de facto taking by eminent domain through the state's power to regulate, whereas a taking by the eminent domain power is an explicit use of the sovereign power. *See City of Monterey,* 526 U.S. at 734-35, 119 S.Ct. 1624 (Souter J., concurring in part and dissenting in part) (noting that "the ultimate issue [of compensation] is identical in both direct and inverse condemnation actions.").

1. *Elements of a Takings Claim*

In a federal Takings Clause analysis, plaintiff must establish that property was taken by the government for public use without just compensation. U.S. Const. amend. V. The Fifth Amendment does not mandate that government cannot interfere with property rights, rather it mandates that the government must provide just compensation when an "otherwise proper interference amount[s] to a taking." *First English,* 482 U.S. at 315, 107 S.Ct. 2378. Thus, in an inverse condemnation case, the statute or regulation at issue is not invalidated, but the remedy is, in some situations, that compensation must be paid by the government to the property owner. *See id.* Thus, it is the Fifth Amendment that provides the remedy for an interference with property rights that rises to the level of a taking. *See id.* at 314-16 & n. 9, 107 S.Ct. 2378. The government does have the option, once a taking is judicially determined, to cease interfering with the property and pay compensation only for a "temporary" taking, but

not for any subsequent "permanent" taking. *See id.* at 318, 107 S.Ct. 2378.

Many of the most complicated taking issues revolve around the concept of what the property interest is that was taken. Here, the property interest is straightforward. The property interest is the ownership of real property in fee simple and the ownership of an easement over another's property. *Reitsma,* 774 A.2d at 838. These are both classic property interests in land. This is not a case where government regulation leaves the property in the hands of the record owner, but the property has been so diminished by governmental regulation that there was a de facto taking of property. *See Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124-27, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

For a takings claim to be prosecuted, the government must have taken the property interest. Here, by operation of law, title to these property interests was transferred to the State from a private entity. *Reitsma,* 774 A.2d at 838. The State has acquired title to the land in fee simple. The State has also acquired title to an easement by prescription.

The third element of a takings claim is that the taking must be for a public use. The public use requirement is generally viewed as a restriction on the government's eminent domain power. *Hawaii Hous. Auth. v. Midkiff,* 467 U.S. 229, 239-42, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984) (discussing the public use requirement). The government cannot use that power unless its use is for the benefit of the public. *Id.* at 248, 104 S.Ct. 2321 (defining public use, however, as reaching to the full extent of the state's police power). Here, the State has taken the

property interests specifically on behalf of the public for public use. This fact distinguishes this case from others where by operation of law title to land is transferred from one private entity to another for the benefit of the other.

In this case, title has been transferred from a private entity to the State for the benefit of the public. The State is thus acquiring title expressly for the benefit of the public. The Rhode Island Supreme Court explicitly stated that was how the State was able to adversely possess the property and acquire an easement over the Reservoir. *Reitsma,* 774 A.2d at 838.

2. *United States Supreme Court Takings Clause Decisions*

Over the last twenty years, the United States Supreme Court has addressed governmental takings in great detail, developing a map for this Court to follow. The Supreme Court recognized that there are two types of per se takings where compensation is mandated. The first type is where governmental action has resulted in a permanent physical occupation of the property. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 441, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). The second type of per se taking occurs when governmental regulation denies the owner of virtually all economically beneficial use of the property. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). In each of these instances, just compensation is required. It is of little consequence that the governmental invasion is small or that the public purpose served is great. Even where there is no per se taking, there may still be a regulatory taking, but the Court must engage in an ad hoc factual

inquiry to determine if just compensation is due. *Penn Central,* 438 U.S. at 124, 98 S.Ct. 2646.

Although the government may have admirable goals of land use regulation, the government's power to advance these goals is subject to the limits imposed by the Takings Clause. *See Dolan v. City of Tigard,* 512 U.S. 374, 396, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). These per se taking rules established by the Supreme Court form an outer limit to the government's ability to effectuate public policy without compensation. *See id.* The per se rules serve "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 835 n. 4, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)). Additionally, these limitations on the exercise of governmental power prevent a state from "sidestepp[ing] the Takings Clause by disavowing traditional property interests long recognized under state law." *Phillips v. Washington Legal Found.,* 524 U.S. 156, 157, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998).

A permanent physical occupation does not merely restrict the use of property, but results in the "practical ouster of his possession." *Loretto,* 458 U.S. at 428, 102 S.Ct. 3164 (quoting *Northern Transp. Co. v. Chicago,* 99 U.S. 635, 642, 25 L.Ed. 336 (1878)). It does not matter that the occupation may be small or that the occupation does not "seriously interfere with the landowner's use of the rest of his land." *Id.* at 430, 102 S.Ct. 3164. In *Loretto,* the Supreme Court cited cases where the Court had found that a permanent physical occupation was the equivalent of a governmental taking of ownership to the property. *See*

e.g., id. at 430, 102 S.Ct. 3164 ("It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.") (quoting *United States v. Causby,* 328 U.S. 256, 261, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946)); *id.* at 431, 102 S.Ct. 3164 ("[B]ecause there had been 'an actual taking of possession and control,' the taking was as clear as if the Government held full title and ownership.") (quoting *United States v. Pewee Coal Co.,* 341 U.S. 114, 116, 71 S.Ct. 670, 95 L.Ed. 809 (1951)); *accord Palazzolo v. Rhode Island,* 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) ("The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use.").

The Supreme Court continued its explication of the nature of a permanent physical occupation by discussing how such an occupation interferes with the property rights traditionally associated with ownership of real property. *Loretto,* 458 U.S. at 435-36, 102 S.Ct. 3164. The Court noted that, in the case of a permanent physical occupation, "the government does not simply take a single 'strand' from the 'bundle' of the property rights: it chops through the bundle, taking a slice of every strand." *Id.* at 435, 102 S.Ct. 3164. The rights at issue are the rights to possess, use, and dispose of property. *Id.* The owner is denied the power to exclude others from the property. *Id.* "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Id.* (citing *Kaiser Aetna v. United States,* 444 U.S. 164, 179-80, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979)). In *Kaiser Aetna,* the Court held that a navigational servitude that gave access to the public to a private pond was a constitutional taking that required just compensation. 444

U.S. at 179-80, 100 S.Ct. 383 ("In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."). Related to the power to exclude, a permanent physical occupation denies the owner the power to control the use of the property. *Loretto,* 458 U.S. at 436, 102 S.Ct. 3164. Additionally, the occupation effectively strips from the owner the power to dispose of the property because it will "empty the right of any value, since the purchaser will also be unable to make any use of the property." *Id.* Finally, the Court stated that when the action of the government allows a stranger to invade directly and occupy the property, there is a "special kind of injury." *Id.*

In *Nollan,* the United States Supreme Court ruled that a public easement was a permanent physical occupation for the purposes of the per se taking rule of *Loretto.* 483 U.S. at 831-32, 107 S.Ct. 3141. The Court stated that a taking occurs "for the purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id.* at 832, 107 S.Ct. 3141; *see also Kaiser Aetna,* 444 U.S. at 180, 100 S.Ct. 383 ("And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation."); *but see PruneYard Shopping Center v. Robins,* 447 U.S. 74, 82-85, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) (concluding that the right to exclude students collecting signatures for petitions was not essential to the property right of a shopping mall when

it could restrict the activity with reasonable time, place, and manner regulations).

The other per se taking occurs when governmental action denies the property owner of all economically beneficial use. *See Lucas,* 505 U.S. at 1015, 112 S.Ct. 2886. In *Lucas,* the Supreme Court offered a rationale for this per se rule: "the heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 1018, 112 S.Ct. 2886. The Court explained that where all economically beneficial use of land is denied, the state can only deny compensation when the interests that the state proscribes were never part of the owner's title. *Id.* at 1027, 112 S.Ct. 2886. In U.S. Supreme Court parlance, this means that if the state action is part of the state's background principles of property law and nuisance law, no compensation is due. *Id.* at 1029, 112 S.Ct. 2886 ("Any limitation so severe cannot be newly legislated or decreed (without compensation) but must inhere in the title itself.").

Lucas contains little specific guidance on what supports these background principles of law. The Court stated that "[a] law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts-by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." *Id.* The Court gave a few examples. When the state takes property by necessity to stop a fire, no compensation is due. *Id.* at 1029 n. 16, 112 S.Ct. 2886. When the state denies a permit to fill in a lake-bed that would have the effect of flooding others' land, no

compensation is due. *Id.* at 1029, 112 S.Ct. 2886. When the state orders a nuclear plant to cease operations because it is situated on an earthquake fault, no compensation is due. *Id.* These, however, are all examples of nuisance and not other background principles of property law. With respect to property law, the Court cautioned however, that the state may not simply recast its action as a background principle of state law. *Id.* at 1031, 112 S.Ct. 2886 ("State, by ipse dixit, may not transform private property into public property without compensation.") (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 164, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980)). Instead, the state carries the burden of proving that the background principles allow a certain result. *Id.*

In a subsequent decision, the Court has explained that a background principle of property law is not simply any law or regulation that was in effect prior to an owner acquiring title. *Palazzolo,* 533 U.S. at 629-30, 121 S.Ct. 2448. A background principle must be more than a preexisting regulation. *See id.* Some courts have ruled that the law of public trust and the law of custom are background principles because land held in public trust or by custom was never part of a landowner's title. *See, e.g., Stevens v. City of Cannon Beach,* 317 Or. 131, 854 P.2d 449, 456 (Or.1993) (holding that by custom the public had always held the dry sand beach in fee simple absolute and that area was never part of the landowner's title); *Orion Corp. v. State,* 109 Wash.2d 621, 747 P.2d 1062, 1073 (1987) (holding that state's shoreline was held in public trust and any restrictions on use mandated by the public trust doctrine could not be a taking).

B. *Analysis*

Here, the State has acquired title to a portion of the bottom of the Reservoir and an easement by prescription on behalf of the public to use the Reservoir for recreational purposes. The State did not act through its eminent domain power. The State, instead, utilized the adverse possession statute to acquire these property rights. Thus, this claim is a species of inverse condemnation. The statute, as applied, has condemned the property as if it had been taken by eminent domain.

When the State acquires title in fee simple to land, without compensation, it engages in a permanent physical occupation of property of the highest order. *See Loretto,* 458 U.S. at 427-28, 102 S.Ct. 3164. The State has permanent possession of the land, resulting in the ouster of the record owner. *See id.* It has acquired all of the sticks contained in the bundle of property rights because it owns the land. *See id.* at 435, 102 S.Ct. 3164. The private individual has no property rights. *See id.* When the State acquires an easement on behalf of the public that terminates a property owner's right to exclude others from his or her land and allows any member of the public to enter and exit the property without restriction, the State has engaged in a permanent physical occupation. *See Nollan,* 483 U.S. at 831-32, 107 S.Ct. 3141. Both are per se violations of the takings clause. *See id.; Loretto,* 458 U.S. at 441, 102 S.Ct. 3164. Therefore, plaintiff has alleged a sufficient takings claim in the complaint in this case.

This Court also notes that because the State acquired title to a portion of the reservoir bottom, the State has wiped out all of plaintiff's economically beneficial use of that property. *See Lucas,* 505 U.S. at 1015, 112 S.Ct. 2886.

Furthermore, the Court notes that as the State has placed the entire reservoir under a public easement, the State may well have wiped out all economically beneficial use of the Reservoir. *See id.; see also Kaiser Aetna,* 444 U.S. at 180, 100 S.Ct. 383 ("This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina."). The State has impressed a private individual into service to provide the public unrestricted use of private property. *See, e.g., Lucas,* 505 U.S. at 1018, 112 S.Ct. 2886. Plaintiff has alleged sufficient facts to make out a takings claim.

C. *Defendant's Arguments*

Defendant offers a number of arguments as to why the State's actions should not amount to a taking. The Court addresses each argument in turn.

1. *Adverse Possession and the Takings Clause*

Defendant argues that no compensation is due when property is acquired by adverse possession. The crux of defendant's position is that adverse possession and compensation are mutually exclusive concepts-compensation is never paid when a private party adversely possesses property. Defendant is making the tautological argument that adverse possession by the state cannot be a taking because the state has adversely possessed property. In this factual situation, this Court disagrees. Adverse possession is bar to trespass and ejection proceedings. *See, e.g.,* R.I. Gen. Laws § 34-7-1. Here the government has taken

possession of the property, and the government's actions are always subject to the Takings Clause of the Constitution. U.S. Const. art. VI, § 2 (the Supremacy Clause). Plaintiff is not challenging the State's title to the property, rather plaintiff is seeking the remedy of just compensation. It does not matter how the State takes property, only whether the Constitution mandates that the State pay compensation. *First English,* 482 U.S. at 314-15, 107 S.Ct. 2378.

Defendant cites several state court cases for the proposition that when a state acquires property by adverse possession or an easement by prescription there is no taking. This Court presents a brief summary of those state court decisions cited by defendant and other decisions found by the Court. Their persuasive value to this Court, however, is limited for two reasons. First, although state courts are equally competent to decide questions of federal law, a federal court is not bound by a state court's determination on an issue of federal law. Second, these state courts, for the most part, were not interpreting the United States Constitution. They were interpreting their own state constitutions. The takings clauses in those state constitutions do not mirror the exact text of the United States Constitution, indeed some are significantly more detailed.

In 1985, the Ohio Supreme Court was faced with a claim that the City of Columbus had encroached on a private landowner's property. *State, ex rel. A.A.A. Investments v. City of Columbus,* 17 Ohio St.3d 151, 478 N.E.2d 773 (1985) (per curiam). Specifically, two streets had been constructed in such a manner that they occupied a small portion of property of the private landowner. *Id.* at 774. The Ohio Supreme Court only addressed the takings issue

under the Ohio Constitution that contains significantly different wording than the federal Constitution. *Id.* The Court concluded that adverse possession is not a taking because the government has not taken property, rather the former owner has lost any claim of ownership over the property. *Id.* at 775.

In 1993, the Alaska Supreme Court determined that a municipality's prescriptive easement did not entitle a property owner to just compensation under the Alaska and United States Constitutions. *Weidner v. State,* 860 P.2d 1205, 1212 (Alaska 1993). The Court reasoned that after the prescriptive period had ended, any claim for just compensation was similarly extinguished. *Id.* The statute of limitations for prescription barred any takings claim, it ruled. *Id.*

The Maine Supreme Court recently followed the Alaska Court's reasoning and held that there was no claim for just compensation in a case where a municipality had acquired a prescriptive easement. *Stickney v. City of Saco,* 770 A.2d 592, 603 (Me.2001). The Court agreed that under the state constitution the private landowner must bring an action for inverse condemnation prior to the expiration of the prescriptive period. *Id.* The decisions of other state courts reflect similar reasoning. *See Board of County Comm'rs v. Flickinger,* 687 P.2d 975, 983-85 (Colo.1984) (en banc) (concluding that adverse possession of a road, pursuant to state statute, was not a taking); *Commonwealth v. Stephens,* 407 S.W.2d 711, 712 (Ky.1966) (rejecting the lower court's conclusion that the state constitution requires compensation in the case of adverse possession and holding that "since the original owner has lost his claim of title, the state is no longer taking his property."); *Rogers v. Marlin,* 754 So.2d 1267, 1273 (Miss.Ct.App.1999)

("[D]amages are never a part of adverse possession, which is what a prescriptive easement is. Unlike eminent domain or a petition for a public way across the property of another without the benefit of the law of dominant/servient tenements, the original owner of the property over which the prescriptive easement in question runs has long since forfeited his right to demand payment for the easement over his property."); *Dunnick v. Stockgrowers Bank of Marmouth,* 191 Neb. 370, 215 N.W.2d 93, 96 (1974) (concluding that the Takings Clause does not bar the state from acquiring property by adverse possession, especially where it does so on behalf of the public, and the owner must exercise his or her rights within the statutory possession period); *City of Ashland v. Hardesty,* 23 Or.App. 523, 543 P.2d 41, 43 (1975) (holding that the Takings Clause in the Oregon Constitution does not prohibit adverse possession by the State); *Petersen v. Port of Seattle,* 94 Wash.2d 479, 618 P.2d 67, 70 (1980) ("A 10-year period of time, however, together with the requisite elements of adverse possession would, in a case such as this, have vested the Port with a prescriptive avigation right in plaintiffs' property. That avigation easement, if prescriptively acquired, would not be compensable.").

In many of the state decisions on this issue, the state courts held that the party was precluded from bringing the takings claim after the statutory period of adverse possession had been completed although the party could have brought a takings claim prior to the end of that statutory period. *See, e.g., Weidner,* 860 P.2d at 1212. This is a misstatement of what is transpiring in adverse possession and prescription cases. The property interest is not acquired by the government until the adverse possession and prescriptive period has been completed. A plaintiff could

not bring a takings claim until the possession or prescription period had been completed because, until that time, the government had not taken a property interest. In the case of adverse possession, prior to the end of the statutory period, the adverse possessor has no rights to the property. *See, e.g.,* R.I. Gen. Laws § 34-7-1. A record owner could bring an action of trespass and ejectment. Under the trespass claim, the record owner could seek damages for the trespass. Under the ejectment claim, the record owner could stop the adverse possession clock from running and enjoin the putative adverse possessor from continued possession of the property. As the putative adverse possessor had no property rights, however, the record owner could not make out a takings claim.

Similarly in the case of a prescriptive easement, the record owner could bring an action for trespass and ejection. There is no property interest, yet, that has been taken away from the record owner. Therefore, there has been no taking prior to the completion of the statutory period. In this case, because the public was using the Reservoir, and not the State, plaintiff had no claim against the State of any kind prior to the end of the prescriptive period. Plaintiff could only sue private individuals for trespass. As there was no state law that mandated that plaintiff allow access to these individuals, prior to the end of the prescriptive period, there was no state action and no takings claim could have been alleged.

If the takings clock were to stop at the moment the adverse possession clock has run, then the record owner as against the government is in a curious Catch 22 situation. He or she had no takings claim prior to the completion of the adverse possession prescription period, but would be similarly barred from having a takings claim after the

period was completed. This Court does not sanction this bonanza for the government at the intersection of property law and constitutional law.

Many of these state court cases (as defendant argues) rely on the Supreme Court decision, *Texaco v. Short,* 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982), for the proposition that the State can adversely possess property and that such possession is not subject to the Takings Clause. *Texaco v. Short,* however, has nothing to do with adverse possession or prescription by the state. In *Texaco v. Short,* the Supreme Court was faced with several constitutional challenges to the State of Indiana's Mineral Lapse Act. The Act provided "that a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property, unless the mineral owner files a statement of claim in the local county recorder's office." 454 U.S. at 518, 102 S.Ct. 781. The Supreme Court held that such a lapse was not subject to the Takings Clause. *Id.* at 530, 102 S.Ct. 781. The Court reasoned that this property may be abandoned, that the owner has no right to compensation, and that it is "the owner's failure to make any use of the property-and not the action of the State-that causes the lapse of the property right." *Id.*

Texaco v. Short, despite its broad language, is not controlling here. In *Texaco v. Short,* the statute allowed the extinguishment of a property right based on abandonment. *Id.* at 518-20, 102 S.Ct. 781. Land cannot be abandoned. Upon extinguishment, any mineral rights reverted back to the land from which they had been severed. *Id.* This reversion is between two private individuals, much like the typical situation of adverse possession, where the

government would not be required to provide compensation. *See id.* Here, the State assumes title, without compensation, allowing the public to permanently physically occupy the record owner's land to effectuate a public easement on a man-made reservoir, eliminating the owner's right to exclude people from its property. *Texaco v. Short* does not, as a matter of law, bar plaintiff's takings claim.

The Takings Clause was meant to protect private individuals from excessive government intrusion on their property rights. *See, e.g., Nollan,* 483 U.S. at 835 n. 6, 107 S.Ct. 3141. Simply because an area of law may be ancient and well settled does not mean that it trumps the mandates of the United States Constitution. The Fifth Amendment contains a limitation on governmental power vis a vis private property. U.S. Const. Amend. V. This Court recalls the words of Justice Holmes: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.,* 260 U.S. at 416, 43 S.Ct. 158; *see also Nollan,* 483 U.S. at 841-42, 107 S.Ct. 3141 ("California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' see U.S. Const. Amdt. 5; but if it wants an easement across the Nollan's property, it must pay for it.").

The government is not like another private individual, and the Constitution through the Takings Clause recognizes that distinction. The government has the power of eminent domain. The government has the power to regulate land use. Had the government taken the property by eminent domain, it would have been a taking and just

compensation would have been due to the owner. *See Nollan,* 483 U.S. at 831, 107 S.Ct. 3141. Had the government created an easement over the property by legislative action, just compensation would have been due. *See id.* at 834-37, 107 S.Ct. 3141 (reasoning that since a requirement of an "uncompensated conveyance of the easement outright would violate the Fourteenth Amendment," the conveyance of an easement as a condition for a permit also requires compensation unless there is an essential nexus between the legitimate state interest and the condition); *see also Opinion of the Justices (Public Use of Coastal Beaches),* 139 N.H.82, 649 A.2d 604, 611 (1994) ("Because the bill provides no compensation for the landowners whose property may be burdened by the general recreational easement established for public use, it violates the prohibition contained in our State and Federal Constitutions against the taking of private property for public use without just compensation.").

Had the state legislature regulated the use of the Reservoir, in such a way that required private property owners to allow the public to use their property unfettered, just compensation would have been due. *See Nollan,* 483 U.S. at 837, 107 S.Ct. 3141. Had the government conditioned further benefits on the private individual allowing access to the property, a taking might have occurred. *See id.; Dolan,* 512 U.S. at 386, 114 S.Ct. 2309 (discussing exactions and the essential nexus test). The government cannot escape the Takings Clause by opting to sit by until title is transferred to it, and then claim that it is not subject to the United States Constitution. The Takings Clause and adverse possession and prescription statutes cannot be mutually exclusive. The State must

abide by the terms of the United States Constitution. U.S. Const. art VI, § 2.

2. *The Use of an Inherent Sovereign Power*

Defendant also claims that the State must exercise an act of sovereignty to effectuate a taking. If the State is not acting as a sovereign, defendant argues, then the State should be treated as any other private individual would be. To be acting as a sovereign, defendant claims, the State must exercise either its eminent domain power or its police power, neither of which it utilized here. This argument has no merit. Unlike a private individual, the State must abide by the U.S. Constitution in its actions. U.S. Const. amend. XIV. Additionally, the State acquired an easement on behalf of the public, something that a sovereign, but no private individual, can do. Furthermore, if the State is not using its police power or eminent domain power, then the State action falls outside the public use requirement of the Takings Clause and the State could not act on behalf of the public. *See Hawaii Hous. Auth.,* 467 U.S. at 240, 104 S.Ct. 2321 (holding that public use is synonymous with the state's police power).

3. *Background Principles of State Law*

Defendant also argues that because adverse possession and prescription are background principles of state property law, there can be no taking. Insofar as the State has engaged in a permanent physical occupation of plaintiff's property, the Court need not delve into the state's background principles of property law. *See Lucas,* 505 U.S. at 1027, 112 S.Ct. 2886. Instead, the Court must treat this as if the State took the property by eminent domain. A

background principle analysis is only required when the government regulates out all economically beneficial use of the property. *Id.* Even if the background exceptions of property law applied here, no U.S. Supreme Court precedent establishes that the situation presented here would fall under that exception. A background principle in property law exception occurs when a property right that was allegedly taken is determined to have never been part of the property in dispute. *See, e.g., Stevens,* 854 F.2d at 456. Simply because a party had notice of a law is not sufficient to render it a background principle. *See Palazzolo,* 533 U.S. at 629-30, 121 S.Ct. 2448. The property interest here was owned by a private entity and taken by the State, and therefore was always part of the property that plaintiff owned.

This Court concludes that plaintiff has alleged a takings claim that would normally be sufficient to survive a motion to dismiss. But there are other principles applicable here.

STATUTE OF LIMITATIONS AND DOCTRINE OF LACHES

Defendant makes various arguments that this claim is time-barred by the statute of limitations. In general, 42 U.S.C. § 1983 governs claims for just compensation. *City of Monterey,* 526 U.S. at 710, 119 S.Ct. 1624. Because § 1983 does not contain its own statute of limitations, the Court must examine state law for a limitations period analogous to the constitutional wrong asserted. Takings claims sound in tort. *Id.* at 709, 119 S.Ct. 1624. The statute of limitations for a tort action in Rhode Island is three years. R.I. Gen. Laws § 9-1-14; *see also Pearman v. Walker,* 512 F.Supp. 228, 234 (D.R.I.1981) (holding that an action

against a Rhode Island municipality under § 1983 is governed by the statute of limitations for personal injuries).

To determine if the claim is time-barred, this Court must determine when the taking occurred and when any takings claim accrued. Plaintiff argues that its takings claim did not begin to accrue until the Rhode Island Supreme Court rendered its decision in 2001. Defendant argues that the takings claim accrued as soon as the State built the boat ramp in 1965.

As already discussed, this Court holds that the taking occurred in 1975, at the moment the property was adversely possessed and an easement by prescription was created.[6] Prior to 1975, plaintiff had only a claim for trespass against the state for the boat ramp. As to the use of the Reservoir by the public, plaintiff had no claim against the state at all, but only against private individuals for trespass.

Concluding that the taking occurred in 1975 does not resolve the issue of whether this claim is time-barred. The Court must determine when a takings claim accrued. As this Court has already discussed, a takings claim is not ripe for federal court review until there is a final decision

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[6] Even if the placement of the boat ramp constituted a permanent physical occupation of plaintiff's property and resulted in a taking at that time, that fact would not change the determination of the date that the taking by adverse possession occurred. This Court is not faced with a claim based on the presence of the boat ramp, but a claim based in the State's acquisition of the title to the land under the boat ramp by adverse possession. These are two distinct events.

by the state court on the merits. *Williamson,* 473 U.S. at 186-87, 105 S.Ct. 3108.

Determining when a claim is ripe for federal court review, in this case however, does not answer whether this case is time-barred. In a typical takings case, if there is such a thing, the owner of the property has control of the litigation-that is, the owner would be the plaintiff in both the state court and any federal court proceedings. For example, the owner would challenge a given state regulation in the state courts, and if plaintiff lost and the regulation was upheld, could proceed to the federal courts to seek compensation. That plaintiff could appeal the state court decision to the United States Supreme Court, if compensation had been denied, or if the claim became ripe for lower federal court review, plaintiff could commence an action in a United States District Court. *Williamson* addressed this litigation scenario. 473 U.S. at 175, 105 S.Ct. 3108.

In contrast, here, Pascoag was the defendant at the state level because the State sought a declaration of its rights. Pascoag did not have to wait for the State to initiate its action before it had a cognizable takings claim. Pascoag's predecessor in title had a number of remedies in state court in 1975, but took advantage of none of them. Pascoag's predecessor could have sought to quiet title to establish that the prerequisite determination that the State had committed a takings had occurred. It could have sued for trespass and ejectment, prompting the State to raise the defense of adverse possession and prescription. It could have argued that based on the State's open and notorious occupancy, the State had engaged in a de facto condemnation of the property and sought compensation. In short, Pascoag's predecessor in title in 1975 had a cause of action in state court for just compensation. It did not

exercise that right. Instead, Pascoag and all its predecessors in title sat idly by and waited for twenty-six years after the cause of action for just compensation accrued-until the State asserted its adverse possession and prescription claim. Pascoag's predecessor may not have had a ripe cause of action in federal court in 1975 but it did have a ripe cause of action in state court in 1975 to determine its property rights and seek just compensation. Indeed, any compensation due to plaintiff's predecessor under the Takings Clause would have been the value of the property interests taken in 1975. That cause of action was time-barred years ago.

The State's three year statute of limitations for personal injury begins to run on the accrual of a tort claim. R.I. Gen. Laws § 9-1-14. For these purposes, the claim accrued, or was ripe in state court, when plaintiff's predecessor was aware or should have been aware of the injury. Since the Rhode Island Supreme Court determined that the State's presence was open, notorious, and hostile, placing the then owner on notice of its presence, the owner should have been aware that the taking had occurred. The statute of limitations began to accrue in 1975 and the cause of action became time-barred in 1978.

This Court is well aware that a federal takings claim is ripe only after a state court renders a final decision on the merits, and the statute of limitations does not begin to run in a federal takings claim until the claim is ripe under federal law. *See, e.g., New Port Largo, Inc. v. Monroe County,* 985 F.2d 1488, 1493 (11th Cir.1993). It would be truly bizarre, however, to allow this claim to proceed. For state law purposes, this claim is twenty-three years too old, yet it is only ripe for federal law purposes now. This Court cannot sanction such an absurd result. Here,

plaintiff and its predecessors in title, through repeated inaction, let their rights fritter away. They had multiple chances to take control of the situation and failed to do so. This Court concludes that because the underlying state claim for just compensation is barred by the statute of limitations, this federal claim is similarly barred by the statute of limitations.

Even if this claim is not a cause of action at law that is barred by the statute of limitations, the claim nonetheless would be barred by the equitable doctrine of laches. To reward plaintiff and its predecessors in title for sleeping on their rights for twenty-six years offends the notion that a party must come to an equity court with clean hands. *See Codex Corp. v. Milgo Elec. Corp.,* 717 F.2d 622, 633 (1st Cir.1983) ("The maxim of 'he who comes into equity must come with clean hands' of necessity gives wide range to a court's use of 'discretion to withhold punishment of behavior which it considers not to warrant so severe a sanction.'") (quoting *Norton Co. v. Carborundum Co.,* 530 F.2d 435, 442 (1st Cir.1976)). The Court cannot sanction proceeding with a claim that is so utterly stale.

The claim, at the very least, is barred by the doctrine of laches. *See Levald, Inc. v. City of Palm Desert,* 998 F.2d 680, 687 (9th Cir.1993) (holding sua sponte dismissal is not erroneous when defense of statute of limitations has not been waived); *Street v. Vose,* 936 F.2d 38, 39 (1st Cir.1991) (per curiam) (affirming sua sponte dismissal of complaint on statute of limitations grounds). The doctrine of laches is an equitable defense barring a claim for relief, prior to the running of the limitations period, "where a party's delay in bringing suit was (1) unreasonable, and (2) resulted in prejudice to the opposing party." *K-Mart Corp. v. Oriental Plaza, Inc.,* 875 F.2d 907, 911 (1st Cir.1989).

Clearly, a twenty-six year delay in bringing suit is unreasonable. Clearly, defendant has been prejudiced by this twenty-six year delay. The situation as it existed in 1975 cannot be replicated in making a determination of just compensation as of that time.

For all the reasons discussed, at this time, plaintiff cannot maintain a cause of action for just compensation for the taking that occurred in 1975. This Court concludes that plaintiff's claim is barred by the tort statute of limitations. If plaintiff's claim is deemed an equitable one it would be barred by the doctrine of laches. Therefore, Count I of the complaint must be dismissed.

REMAINING STATE LAW CLAIMS

Counts II, III, and IV of plaintiff's complaint assert purely state law claims. This Court declines to exercise supplemental jurisdiction over those claims. Supplemental jurisdiction allows a federal court to hear both state and federal claims if they would ordinarily be expected to be tried in one judicial proceeding. 28 U.S.C. § 1367(a). Supplemental jurisdiction, however, is discretionary. *Penobscot Indian Nation v. Key Bank of Maine,* 112 F.3d 538, 564 (1st Cir.1997). As § 1367 states, the Court may decline to exercise jurisdiction if the Court has dismissed all claims over which it has original jurisdiction.

Here, because the Court has dismissed Count I, the only federal claim in the complaint, the Court declines to retain jurisdiction over the remaining state law claims. *See id.* Therefore, the state law claims are dismissed without prejudice.

CONCLUSION

Because Count I of plaintiff's complaint is time-barred, the Court grants defendant's motion to dismiss. As Count I is the only federal claim asserted by plaintiff, the remaining state law claims contained in Counts II, III, and IV are dismissed without prejudice for lack of federal question jurisdiction.

The Clerk shall enter judgment for defendant to that effect, forthwith.

It is so ordered,

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774 A.2d 826

Jan REITSMA et al.

v.

PASCOAG RESERVOIR & DAM, LLC.

No. 2000-306-Appeal.

Supreme Court of Rhode Island.

June 20, 2001.

Michael L. Rubin, Alan Shoer, Providence, Joseph S. Larisa, Jr., for Plaintiff.

Barry J. Kusinitz, John B. Webster, Warwick, for Defendant.

Present: WILLIAMS, C.J., LEDERBERG, BOURCIER, FLANDERS, and GOLDBERG, JJ.

OPINION

FLANDERS, Justice.

Can the state government involuntarily divest owners of private property other than by eminent domain or by condemnation? Yes, we hold, because, like private parties, the government itself can acquire an easement by prescription or title by adverse possession over property that was otherwise privately owned during the period of the taking. To do so, it must establish actual, open, notorious, hostile, and continuous use of the property under a claim of right for ten years, as required by G.L.1956 § 34-7-1. *See, e.g., Talbot v. Town of Little Compton,* 52 R.I. 280, 286, 160 A. 466, 469 (1932) (holding that municipality, on behalf of the public, "openly, notoriously and uninterruptedly used the entire tract [of a beach] under a claim of

right for a length of time far in excess of the statutory period for obtaining title by adverse uses").

In this case, acting through an executive department now known as the Department of Environmental Management, the state [1] built a boat ramp in 1965 on a waterfront lot that it acquired in 1964. The property and the boat ramp abutted an artificially created body of water called Echo Lake in Glocester. Although the record does not reveal exactly when it did so, the state also erected and maintained signs near the boat ramp that purported to regulate the public's use of the lot, the ramp, and the lake. At all times material to this case, the defendant corporation, Pascoag Reservoir & Dam, LLC (corporation) – or one of its predecessors in title – has been Echo Lake's owner of record. For thirty-two years, from 1965 through 1997, the state maintained and operated its lakeside property so that members of the public could park their vehicles there and then use the ramp as a point of access to the lake for various recreational activities, including boating and fishing. Over that period, innumerable members of the public and other lakeside property owners have used the ramp as a means of access to the lake for such purposes – without interruption, objection, or interference by the corporation or by any of its predecessors in title. Not until 1997 – when it posted a "NO TRESPASSING" sign – did the corporation – or, for that matter, any of the

[1] Throughout this opinion, we shall refer collectively to the named plaintiffs herein – Jan Reitsma, in his capacity as director, Rhode Island Department of Environmental Management, and Sheldon Whitehouse, Attorney General of the State of Rhode Island – as "the state."

lake's previous owners – communicate any objection to the state's or to the public's use of this boat ramp as a means for boats to access the lake for recreational purposes.

Nevertheless, a Superior Court trial justice – after reviewing the evidence in a nonjury trial – rejected the state's claim to having adversely possessed the lake-bottom property beneath the boat ramp and to having acquired, on behalf of the public, a prescriptive easement to the use of the ramp for lake access. The court concluded that the state's placement of a substantial portion of the ramp on the bottom of the lake and the public's use thereof had been merely permissive. More specifically, the trial justice found that the state had failed to prove by clear and convincing evidence that the collective or individual use of the ramp for access to the lake had been pursued under a claim of right or that it was in any way hostile, open, notorious, or adverse to the interests of the lake owners. For the reasons prescribed below, these conclusions, we hold, were clearly erroneous and, therefore, must be reversed.

Facts and Travel

We reproduce, in pertinent part, the facts and travel of the case, as found by the trial justice and included in his decision of the case:

> "The following facts are generally not in dispute. Pascoag Reservoir, also known as Echo Lake, is an artificially created body of water and is located in the towns of Burrillville and Glocester, Rhode Island. The lake covers between 355 and 387 acres of water surface and is over two miles in length and has over ten miles of shoreline.

"The lake is ringed by approximately 300 private homes, two for-profit businesses and two camps for children operated by religious organizations.

"In 1964, the state purchased a lot abutting the lake of approximately one and three quarter acres. In 1965 the State constructed a boat ramp facility to permit members of the public to launch boats from the ramp onto the lake.

"The State has continuously owned and maintained this boat ramp facility to the present day.

"The boat ramp itself is 30 feet wide with a 12 foot traction surface. It is 48 feet long, 38 feet of which is submerged at ordinary high water. There is also a 'prop-wash zone,' an additional area which extends 6 feet outward from the submerged end of the traction surface and which lies on the lake bed under water.

"The defendant Corporation has claimed ownership of the lake since 1983. The Corporation's predecessors in title who created the lake, did so in 1860 upon lands purchased or owned by the Corporation's predecessors in title and flooded by a dam to create the lake.

"Said predecessors in title were an association of mill owners who created the lake to provide power to its mill interests in the area.

"These predecessors in title maintained the dam, # 016, and controlled the level of the lake uninterruptedly from the lake's creation to its sale to the Corporation in 1983, lowering the lake in winter and raising the lake in summer.

"Since 1983 the Corporation has been assessed real property taxes on the lake by both the towns of Burrillville and Glocester.

"Since 1983 the Corporation has continually paid the taxes levied by both towns and has conducted the maintenance and upkeep of the lake since its purported ownership in 1983.

"Lakefront property owners have been using the lake for swimming, boating and fishing for a substantial period of time.

"Members of the general public, as well as lakefront land owners, have accessed the lake via the State owned and maintained boat ramp since its construction in 1965.

"The State owned boat ramp facility provides the only public access venue for the public to access the lake for boating, fishing, and swimming – and is utilized in summer – and to a lesser degree, in winter for winter related activities.

"On or about July 28, 1997, the Corporation erected a 'no trespassing' sign in the vicinity of the State's boat ramp. In a letter dated July 30, 1997, the Corporation notified the State that it was 'withdrawing any express or implied permission to use the reservoir. No further access by the general public should be permitted through the boat ramp.'

"Other issues arose during this time frame which caused a justice of this Court to issue an order temporarily restraining the Corporation from altering the water levels of the lake without permission from the State's Department of Environmental Management."

In addition, the trial court found as follows:

"In support of its claim that the general public has gained a prescriptive easement for the recreational use of the lake for boating, swimming, and fishing; the State produced at least twelve witnesses to testify at trial from its total of 21 witnesses called. These witnesses testified to years of unfettered access to the lake both prior to and subsequent to the construction of the boat ramp. The witnesses came from the ranks of waterfront lot owners, persons who operated for-profit businesses on, or dependent upon the lake, persons who operated profit and nonprofit campgrounds along the shores of the lake and other members of the general public who came from afar who testified to their use of the boat ramp and the lake itself for fishing, swimming, and the like.

"The witnesses collectively testified that they never sought nor received permission to use the lake or were in any way prohibited or limited in their use of the lake for the recreational purposes customarily engaged in on a lake of this type. The witnesses testified to long years of usage and familiarity as well as shorter more infrequent uses. Many lakefront dwellers testified that the boat ramp was their only means of access to the lake either because of the configuration of their lots or the size of their boats. The State also provided testimony that the value of the lakefront lots, including those sold by the Corporation over the years, was enhanced by the accessibility of the lake either via the boat ramp or the waterfront lots."

After the corporation posted its no-trespassing sign in 1997, the state filed a complaint and petition for injunctive

relief against the defendant corporation. The state alleged violations of the Freshwater Wetlands Act, G.L.1956 §§ 2-1-18 through 2-1-24, and asserted that it had acquired an easement to the lake by virtue of, *inter alia,* the doctrines of easement by prescription and adverse possession. The corporation soon answered and filed a counterclaim alleging inverse condemnation, trespass, and violations of its substantive due process rights pursuant to the federal and state constitutions and 42 U.S.C. § 1983. Over the corporation's objection and in response to the state's motion to do so, the court severed the state's allegations pertaining to the violations of the Freshwater Wetlands Act from the rest of this case. The trial justice also voluntarily dismissed the corporation's inverse condemnation claim, without prejudice. Thereafter, at the conclusion of the trial, it entered a partial final judgment in favor of the corporation under Rule 54(b) of the Superior Court Rules of Civil Procedure. The state has appealed from this judgment.

Analysis

We have long recognized that "one who claims an easement by prescription has the burden of establishing actual, open, notorious, hostile and continuous use under a claim of right for ten years as required by * * * § 34-7-1." *Burke-Tarr Co. v. Ferland Corp.,* 724 A.2d 1014, 1020 (R.I.1999) (quoting *Palisades Sales Corp. v. Walsh,* 459 A.2d 933, 936 (R.I.1983)). "Furthermore, although each element must be established by clear and convincing evidence, * * * '[n]o particular act to establish an intention to claim ownership is required. It is sufficient if one goes upon the land openly and uses it adversely to the true owner, the owner being chargeable with knowledge of

what is done openly on his land.'" *Id.* (quoting *Greenwood v. Rahill,* 122 R.I. 759, 763, 412 A.2d 228, 230 (1980)); *see also Talbot,* 52 R.I. at 286, 160 A. at 469 (explaining that where use "was so [substantial] and * * * so regular and for such a long period of time that any person having a claim of title, if he gave any attention whatever to the matter, would have known the use was hostile and under a claim of right").

In other words, a claim of right to own or use property will arise by implication through objective acts of ownership that are adverse to the true owner's rights, one of which is to exclude or to prevent such use. When confronted with such an open, unsolicited, and long-continued use of the property, the true owner must *affirmatively communicate* either objection or permission to stop the statutory prescriptive period from running. Mere acquiescence or silence, however, in the face of uses that are inconsistent with the true owner's property rights, does not constitute permission. Thus, in *Burke-Tarr,* we reversed this same trial justice's attempt to rely upon the true owner's alleged silent permission for the laying of a pipeline across the property to defeat a prescriptive easement. There we held that:

> "an inference of permissive use, which would defeat the element of hostile use, cannot properly be drawn from the lone fact that the parties entered into a written lease [for a portion of the area that did not include the area over which a prescriptive easement was claimed.]. * * * Moreover, we have found no evidence that [the property owner] objected to [the claimant's] installation [of a pipe], or its continuous use, at any point prior to the expiration of the lease. * * * [W]e conclude that there is no suggestion that

> this pipe, although installed in full view of [the property owner], was done so with her permission." *Burke-Tarr Co.*, 724 A.2d at 1019-20.

The facts in this case supporting the existence of a prescriptive easement are even stronger than they were in *Burke-Tarr*. In contrast to *Burke-Tarr*, here the state did not possess a written lease giving it permission to install a boat ramp on any portion of the privately owned lake, nor was there any agreement between the state and the owner that would have allowed the public to obtain access to and to use the lake from the state's boat ramp for any purpose. Thus, no inference of permission from the lake owner could be drawn from the mere fact that it allowed the use to continue. On the other hand, as in *Burke-Tarr*, no evidence indicated that any owner ever had affirmatively granted permission to the state to use the property in the manner that it was used. Moreover, no evidence showed that any lake owner ever had objected either to the state's installation of the boat ramp or to the continuous use thereof by the public to access the lake – at least not any point before the running of the prescriptive period in 1975 or at any time thereafter until 1997. Thus, following *Burke-Tarr*, we conclude that there is no evidentiary support for the trial justice's finding that this ramp and the public's access to the lake therefrom, "although installed in full view of [the property owner], was done so with [its] permission." *Id.*, 724 A.2d at 1020.

Other state courts have employed similar reasoning to find that the government has acquired property prescriptively. For example, in *Garrett v. Gray*, 258 Md. 363, 266 A.2d 21 (1970), a state appellate court reversed a trial court ruling against the public in a prescriptive-easement case, holding that:

> "The chancellor dismissed the user by the many witnesses who testified below as 'permissive use.' However, we think the use would more appropriately be characterized as use by 'acquiescence.' * * * *'Mere failure to protest is not permission but acquiescence.'* * * *'Acquiescence is the inactive status of quiescence or unqualified submission to the hostile claim of another, and is not to be confused with permission, which denotes a grant of permission in fact or a license.'" *Id.* at 27-28. (Emphasis added.)

See also Swift v. Kniffen, 706 P.2d 296, 303-04 (Alaska 1985) ("The sort of permission which would negate the claim of an adverse user is not mere acquiescence because: [T]he whole doctrine of title by adverse possession rests upon the acquiescence of the owner in the hostile acts and claims of the person in possession."); *Davis v. Wilkinson,* 140 Va. 672, 125 S.E. 700, 702 (Ct.Spec.App.1924) (explaining that acquiescence does not constitute "legal permission"; "[f]ailure to object to the use" constitutes acquiescence, not permission).

Although the public can itself acquire a prescriptive easement by open and continuous adverse use, *see, e.g., Swift,* 706 P.2d at 305 ("[A] public easement may be acquired by prescription."); *Opinion of the Justices,* 139 N.H. 82, 649 A.2d 604, 610 (1994) (stating that general public may acquire easement by prescription to coastal beach land), a state or municipal government, or one of its subdivisions, also can acquire a prescriptive easement over otherwise private property, on behalf of the public, whether or not the public alone could do so. *See Buffalo River Conservation & Recreation Council v. National Park Service,* 558 F.2d 1342, 1344-45 (8th Cir.1977) (holding that public may obtain prescriptive easement to use

private stream); *Talbot,* 52 R.I. at 286, 160 A. at 469; *City of Jacksonville v. Horn,* 496 So.2d 204, 209 (Fla.Dist. Ct.App.1986) ("[L]egally organized or political entities, as distinguished from the unorganized general public, may acquire an easement by prescription or title by adverse possession. * * * [A] city or county represents the public in the establishment of such an easement."); *Hollywood, Inc. v. Zinkil,* 403 So.2d 528, 535 (Fla.Dist.Ct.App.1981) (upholding municipal prescription of beach on behalf of public); *Daley v. Town of Swampscott,* 11 Mass.App.Ct. 822, 421 N.E.2d 78, 82 (1981) ("There is no doubt that a municipality may acquire an easement by prescription to use land located within its limits for a specific public purpose."); *Granite County v. Komberec,* 245 Mont. 252, 800 P.2d 166, 171 (1990) (finding that "County has a prescriptive right to the road" on behalf of public); *Beach v. City of Fairbury,* 207 Neb. 836, 301 N.W.2d 584, 586 (1981) (finding that city acquired prescriptive sewer easement); *Nice v. City of Marysville,* 82 Ohio App.3d 109, 611 N.E.2d 468, 470 (1992) ("A municipal corporation or city may acquire title by adverse possession."); *Koontz v. Town of Superior,* 746 P.2d 1264, 1266 (Wyo.1987) (holding that governmental body could acquire title to land by adverse possession or right to use land by prescription); *State ex rel. Meek v. Hays,* 246 Kan. 99, 785 P.2d 1356, 1363 (1990) (stating that doctrine of prescriptive easements for public highways extends to streams and rivers, and stressing that official action is required for public to obtain prescriptive easement for recreational purposes).

In *Talbot,* a town, on behalf of the public, claimed the right to a contested beach area. The beach owner in *Talbot,* like the lake owners here, possessed paper title to the land in dispute (in that case, an extended beach area).

As here, the property owner in *Talbot* never attempted during the prescriptive period to exclude the public from freely using the privately owned property in question. 52 R.I. at 283, 160 A. at 467. The town and farmers residing in the town openly carted gravel from the beach, removing many loads over a period of years. As here, neither the government nor the public believed they were trespassing in their use of the property. Like the use of the lake through the boat ramp, the beach and its store of gravel in *Talbot* were "openly, notoriously and uninterruptedly used * * * under a claim of right for a length of time far in excess of the statutory period * * *." *Id.* at 286, 160 A. at 468-69. Moreover, in both *Talbot* and in this case, the public's right to use the property stemmed from ostensible governmental authorization to do so. In *Talbot* the public used a beach for recreation that was maintained by the government; here, the public used a boat ramp that had been built and maintained by the state for the public to obtain access to and use the lake for recreation.[2]

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[2] The trial court attempted to distinguish *Talbot* on the ground that the underlying record ownership of the property in that case was in question, whereas, in this case, the lake owners always held clear record title to the lake bed. This issue, however, was neither critical nor even relevant in deciding that case. Indeed, *Roche v. Town of Fairfield,* 186 Conn. 490, 442 A.2d 911, 917 (1982), expressly relied upon *Talbot v. Town of Little Compton,* 52 R.I. 280, 160 A. 466 (1932) in upholding a municipality's right to continue public use of a beach. In *Roche,* there was no question concerning the record ownership of the property. The private party had an undisputed chain of title dating to the nineteenth century. Nonetheless, the Connecticut court, citing *Talbot,* ruled in favor of the municipality's claim based upon adverse use. *Roche,* 442 A.2d at 917. Thus, the existence of a clear record title with respect to the servient estate is irrelevant to the adverse user doctrine.

Given the factual findings of the trial justice and the above-referenced law, we are constrained to conclude that the state's 1965 construction of the boat ramp (a substantial portion of which was located upon and in the lake bed) and its subsequent maintenance of this structure during its uninterrupted use by the public over the next thirty-two years – was open, actual, notorious, hostile, adverse, continuous, and – given the state's objective acts of ownership and the public's highly visible use of the ramp to obtain access to the lake – accomplished under a claim of right as a matter of law. Indeed, there was no evidence whatsoever at trial that any owner of the lake ever had objected to the construction, maintenance, or public use of the ramp until 1997. Permission to engage in such a use of the lake was never sought by the state; and permission, express or implied, was never given for it to build or maintain the physical boat-ramp structure that rested in large part on the owner's lake bed. As such, the state's thirty-two year maintenance of a portion of its boat ramp upon the lake bed amounts to a classic case of adverse possession.[3] *See, e.g., DelSesto v. Lewis,* 754 A.2d 91, 94-95 (R.I.2000) (explaining the doctrine and its application); *Anthony v. Searle,* 681 A.2d 892, 897-98 (R.I.1996) (same); *Gammons v. Caswell,* 447 A.2d 361, 367-68 (R.I.1982) (same).

Accordingly, we conclude that the trial court clearly erred when it found that the "record is devoid of any

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[3] The applicable period for adverse possession or prescriptive easement is ten years. *See* G.L.1956 § 34-7-1; *see also Burke-Tarr Co. v. Ferland Corp.,* 724 A.2d 1014, 1020 (R.I.1999); *Jerry Brown Farm Association, Inc. v. Kenyon,* 119 R.I. 43, 48-49, 375 A.2d 964, 967 (1977).

evidence provided by the state to indicate that the construction of said ramp was hostile, notorious or adverse or constructed under claim of right to the portion of the lake bed occupied by the submerged portion of the boat ramp." The court erred by failing to find that the very act of openly placing a permanent physical structure on another's property without the true owner's permission and maintaining it there for more than ten years is *itself* an action that is so inconsistent with the true ownership of that property that it is therefore notorious, adverse, hostile, and under claim of right as a matter of law. *See Anthony,* 681 A.2d at 897-98 (finding adverse possession by placement of physical structures on disputed property and open use of structures); *Gammons,* 447 A.2d at 367-68 (explaining that ultimate fact to be proved in adverse possession case is whether the claimant has acted toward the land in question as would an average owner); *Greenwood,* 122 R.I. at 763, 412 A.2d at 230 (finding prescriptive easement in favor of the state for water flowing over another's property).

We hold that in the absence of evidence of a knowing trespass or of express permission from any owner, the construction and maintenance of a physical structure on another's property will be deemed to be accomplished under a claim of right because "[n]o particular act to establish an intention to claim ownership is required. It is sufficient if one goes upon the land openly and uses it adversely to the true owner, the owner being chargeable with knowledge of what is done openly on his land." *Greenwood,* 122 R.I. at 763, 412 A.2d at 230 (finding no permission and no objection until after ten years); *see Anthony,* 681 A.2d at 898 (using and cultivating land and erecting structures for statutory period sufficient for

finding of adverse possession); *Gammons,* 447 A.2d at 368 (finding claim of right through mere use and improvement of disputed land).[4]

Indeed, adverseness and hostility have been inferred from the mere *use* of another's property without that owner's communicated permission to do so. *See, e.g., Taffinder v. Thomas,* 119 R.I. 545, 551-52, 381 A.2d 519, 522-23 (1977) (finding use of property over boundary line for statutory period sufficient for adverse possession); *LaFreniere v. Sprague,* 108 R.I. 43, 50-51, 271 A.2d 819, 823 (1970) (holding that mistaken use of another's property for statutory period sufficient for adverse possession); *Talbot,* 52 R.I. at 286, 160 A. at 469 (deeming use of beach adverse and hostile). Here, for thirty-two years the state's boat ramp served as the public point of access to the surface of the lake for many recreational activities by an innumerable multitude of persons. Thus, the trial court's holding that the state did not, through adverse possession, acquire the right to keep and maintain the boat ramp for public use of the lake must be reversed.

Further, the public's use of the lake through the state boat ramp was continuous from its inception to well past the ten-year prescriptive period. Indeed, it had been continuous even through to the filing of the present lawsuit. Nevertheless, the trial court found that the

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[4] In *LaFreniere v. Sprague,* 108 R.I. 43, 50-51, 271 A.2d 819, 823 (1970) and *Paquin v. Guiorguiev,* 117 R.I. 239, 243, 366 A.2d 169, 171 (1976) this Court rejected the minority rule that an adverse possessor must have entered upon a private landowner's property with a specific, self-conscious knowledge that such possessor's own conduct was adverse to another's ownership interest.

evidence of continuous use was insufficient. Thus, the trial justice stated that "the evidence produced gives this Court no indication of how many people actually use or used the ramp to gain access and with what frequency. It isn't clear whether 2 or 200 citizens utilized the ramp to gain access and with what frequency. There is no record of daily, weekly or monthly use." But "[t]he test is not the number of persons actually using it, but the character of the use, – that is, whether or not the public, generally, had the free and unrestricted right to use the road." *Feldker v. Crook,* 208 Ill.App. 3d 1012, 153 Ill.Dec. 888, 567 N.E.2d 1115, 1124-25 (1991). Here, the undisputed evidence established that, since the installation of the state's boat ramp, the public's use of it to obtain access to the lake was "unfettered" and continuous, such that it could not be characterized as haphazard or casual. *Cf. Talbot,* 52 R.I. at 286, 160 A. at 469 (holding that the town's use was so substantial and regular as to support adverse possession); *Catalano v. Town of Windham,* 133 N.H. 504, 578 A.2d 858, 862 (N.H.1990) (holding intermittent use sufficient to establish prescriptive rights to general public when consistent with character of easement claimed); *Luevano v. Maestas,* 117 N.M. 580, 874 P.2d 788, 793-94 (Ct.App.1994) ("[F]requency of use or number of users is unimportant, it being enough if use of the road in question was free and common to all who had occasion to use it as a public highway.") (quoting *Discher v. Klapp,* 124 Ind.App. 563, 117 N.E.2d 753, 757 (1954)); *Town of Sparta v. Hamm,* 97 N.C.App. 82, 387 S.E.2d 173, 176-77 (1990) (holding that continuous use of road by public, even though slight, and maintenance of road by town, however poorly, for prescriptive period was by claim of right and sufficiently hostile for town to establish a public prescriptive easement).

The trial court itself found that "[m]embers of the general public, as well as lakefront land owners, have accessed the lake via the State owned and maintained boat ramp since its construction in 1965. The State owned boat ramp facility provides the only access venue for the public to access the lake for boating, fishing, and swimming – and is utilized in summer – and to a lesser degree, in winter for winter related activities." Indeed, the trial court noted that multiple

> "*witnesses testified to years of unfettered access to the lake* both prior to and subsequent to the construction of the boat ramp. The witnesses came from the ranks of waterfront lot owners, persons who operated for-profit businesses on, or dependent upon the lake, persons who operated profit and nonprofit campgrounds along the shores of the lake and other *members of the general public who came from afar who testified to their use of the boat ramp and the lake itself for fishing, swimming, and the like.*" (Emphases added.)

The court further acknowledged that "[m]any lakefront dwellers testified that the boat ramp was their only means of access to the lake either because of the configuration of their lots or the size of their boats." Given these factual findings, it matters not that the state was unable to establish precisely the exact number of lake users or the exact frequency of their use of the boat ramp to obtain access to the lake.

In sum, the evidence clearly established that (allowing for seasonal variations) untold numbers of the public, including lakefront residents, had used the state's boat ramp facility continuously from 1965 to 1997 to launch boats into Echo Lake and then used the lake itself for

fishing, water-skiing, swimming, and related recreational activities. Indeed, it was the only facility on this lake affording such public access. Moreover, the extent of the public's "years of unfettered access to the lake" certainly was not haphazard or casual.

Thus, the trial court erred when it found that the public's use of the lake "has been permissive through the assent of both the defendant corporation and its predecessors in title." Other than the owners' silent acquiescence, no evidence of this permission existed and none was communicated to the state or to any user. For example, no user of the ramp testified to any permission to use the lake received from any lake owner or from any of its predecessors. Even the trial court acknowledged that the "witnesses collectively testified that they never sought permission to use the lake * * *." Yet the Court's decision states that, "[i]n support * * * of the claim that the Corporation had allowed permissive use of the lake for recreational and other purposes and retained in itself all aspects and rights of ownership in the lake bed and upon the water of the lake, the defense, through Mr. Mesolella, introduced a number of documents * * *." It further notes that "[a] series of letters from the Corporation's predecessor in title to various lakefront landowners, businesses, and organizations were introduced as exhibits to attempt to establish a record of continuous active and affirmative control of the lake from 1937 through 1983 when the Corporation came on the scene, and from 1983 to the present day * * *." The trial court concluded that these documents proved that the lake owner had given permission to the users, thereby defeating the State's claim.

But none of these letters related in any way to the state boat ramp itself or to the public's use of it to obtain

access to the lake. Indeed, none of the letters even mentioned the boat ramp. Moreover, only two of the letters were directed to the state, and those two exceptions were dated before the state acquired the boat-ramp lot. After examining the evidence in the record, we are persuaded that the trial court's permissive-use conclusion was totally unsupported by the evidence. Thus, we conclude, it constituted clear legal error and must be reversed.

Finally, although the corporation voluntarily dismissed its inverse condemnation claim without prejudice, it still complains on appeal that the state's conduct in this case constitutes a "first step in a land grab unrivaled within recent jurisprudence." It then urges this Court to prevent the state from acquiring private property in this manner without first invoking its eminent domain power and without paying the owners the just compensation required by the federal and state constitutions for such takings of private property. But our conclusions concerning the state's adverse possession of the lake bed and its acquisition of a prescriptive easement to obtain access to the lake on behalf of the public are not meant to condone or to condemn the state's conduct in this regard. Indeed, we express no opinion on the propriety of its actions vis-a-vis its initial construction of the boat ramp and, thereafter, its maintenance thereof so that the public could obtain access to the lake via the ramp. Nor do we determine whether it could have been required to pay just compensation to the owners for any such taking that may have occurred.

Nevertheless, even assuming, without deciding, that the corporation and/or its predecessors in title would have possessed viable just compensation and/or trespass claims in response to the state's actions in constructing the boat

ramp and in allowing the public to obtain access to the lake via that ramp, such claims long ago would have lapsed because of the owners' failure to initiate a timely action asserting such claims and because of their failure otherwise to interpose a timely objection to the state's conduct before the prescriptive ten-year period expired (or, for that matter during any potentially applicable limitations period thereafter). *See, e.g., United States v. Dickinson,* 331 U.S. 745, 749, 67 S.Ct. 1382, 1385, 91 L.Ed. 1789, 1794 (1947) (applying six-year statute of limitations to an inverse condemnation suit arising out of government-flooded property and holding that the statute of limitations on the takings claim began to run when "the consequences of [the] inundation have so manifested themselves that a final account may be struck").

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." *Id.* at 748, 67 S.Ct. at 1385, 91 L.Ed. at 1794.

Thus, the corporation's arguments concerning an alleged unconstitutional "taking" ultimately rest upon the premise that no statute of limitations bars the constitutional right of every property owner to obtain just compensation for the government's taking of the owner's property. But this argument garners no support from the relevant cases of the United States Supreme Court on this subject. *See,* e.g., *Texaco, Inc. v. Short,* 454 U.S. 516, 530, 102 S.Ct. 781, 792-93, 70 L.Ed.2d 738, 751-52 (1982) ("[T]his Court has never required the State to compensate the owner for the consequences of his own neglect. * * * It is the owner's failure to make any use of the property –

and not the action of the State – that causes the lapse of the property right; there is no 'taking' that requires compensation."); *Soriano v. United States,* 352 U.S. 270, 271, 77 S.Ct. 269, 270, 1 L.Ed.2d 306, 308 (1957) (applying six-year statute of limitations in inverse condemnation suit); *accord, Dickinson, supra.*

Furthermore, other states that have addressed this issue have adopted each state's statutory period for adverse possession as a statute of limitations for inverse condemnation actions. *See Krambeck v. City of Gretna,* 198 Neb. 608, 254 N.W.2d 691, 695 (1977) (adopting ten-year adverse-possession statute of limitations); *Brazos River Authority v. City of Graham,* 163 Tex. 167, 354 S.W.2d 99, 109-10 (1961) (adopting ten-year adverse possession statute of limitations); *Ackerman v. Port of Seattle,* 55 Wash.2d 400, 348 P.2d 664, 667 (1960) ("[A]n action for constitutional taking * * * may be brought at any time before title to the property taken is acquired by prescription.").

In sum, even if the state's conduct from 1965 to 1975 had been unlawful and amounted to an improper taking of the lake owner's property without paying just compensation, and even if the lake owner's property had not been taken in the constitutional sense until the prescriptive period ended in 1975 – issues that we have no need to decide in this case – the corporation and its predecessors failed to assert any takings claim in a timely manner. Thus, they are barred from asserting them now under any statute of limitations that possibly could apply to such claims – even if, arguendo, they did not begin to accrue in this case until the prescriptive period in question ended in 1975.

Conclusion

We hold that, consistent with controlling case law, and by clear and convincing evidence, the state proved its case at trial, showing that it had acquired a portion of the lake bottom by adverse possession and that it had acquired, on behalf of the public, a prescriptive easement to use the boat ramp to obtain access to the lake for boating, fishing, swimming, and for other recreational purposes. Hence, we sustain the appeal, vacate the Superior Court's judgment, and remand the papers in this case to that court with instructions to enter judgment for the state consistent with this opinion. Given our disposition of this case, we have no need to pass upon the state's alternative estoppel theory, and, therefore, we decline to do so.

GOLDBERG, Justice, with whom Justice LEDERBERG joins, dissenting.

I respectfully dissent from the decision of the majority finding that the state established, by clear and convincing evidence that it had "acquired a portion of the lake bottom by adverse possession and that it had acquired, on behalf of the public, a prescriptive easement to use the boat ramp to access the lake for boating, fishing, swimming, and for other recreational purposes." I do not believe that the majority has clearly defined the extent of the burden it has placed upon the servient estate. In my opinion the result in this case is the creation of a recreational easement upon the lake, with access through the boat ramp, to be enjoyed by anyone. I do not believe the facts in the record support such a broad grant that amounts to a prescriptive easement for recreational use on property indisputably held in private hands and for which the state never had claimed

an interest and did so only after it was foiled in its attempts to purchase the lake.

A declaration of adverse possession of a portion of the lake bottom, coupled with a prescriptive easement to use the boat ramp should not amount to a recreational easement in the waters of the lake. Rather, a prescriptive easement to use the boat ramp merely provides for boat access to the lake and should not include the right to engage in any specific activity and certainly should not provide for any other access except the launching of boats. Further, in light of this Court's obligation to create the least burdensome easement possible, the facts established at trial demonstrate that only abutting property owners and their legitimate customers and guests have used the boat ramp on a consistent basis and, in my opinion, the infringement should be restricted to the abutters. At best, the state failed to establish prescriptive use by anyone but actual abutters and legitimate occupiers of land abutting the lake. Indeed, the state produced only a single witness who was not an abutter who testified that he used the boat ramp for bass fishing on a sporadic basis. Every other user of the reservoir who testified in support of the state's claims in this trial was an abutter or a customer of a commercial abutter. *Bentel v. County of Bannock,* 104 Idaho 130, 656 P.2d 1383, 1386 (1983) ("prescriptive easements are strictly limited to the actual use which gave rise to the easement"); *Firebaugh v. Boring,* 288 Or. 607, 607 P.2d 155, 157 (1980) (citing 5 Restatement of *The Law of Property* § 447 (1944); 3 R. Powell, *The Law of Real Property* § 416 (1979); 2 G. Thompson, *Real Property* § 349 (1961) ("the scope of the privilege of use arising from [a prescriptive] easement as against the owner of the servient tenement" is limited by the use which created it)); 25

Am.Jur.2d *Easements and Licenses* § 93 (1996) (when a "right of way is established by prescription, it is limited to the actual user * * * [a] use may be allowed [its] natural expansion in accordance with the purpose of the easement, but no greater burden may be placed on the servient estate." A right of way by prescription is bounded by a line of reasonable enjoyment); *see also McCullough v. Waterfront Park Association, Inc.*, 32 Conn.App. 746, 630 A.2d 1372, 1379 (1993) (citing *Kuras v. Kope*, 205 Conn. 332, 533 A.2d 1202 (1987) (stating that when an easement is created by prescription it must be reasonable and the least burdensome possible on the servient estate)); *and Klar Crest Realty, Inc. v. Rajon Realty Corp.*, 190 Conn. 163, 459 A.2d 1021, 1026 (1983) (quoting *Kaiko v. Dolinger*, 184 Conn. 509, 440 A.2d 198 (1981) ("[a] prescriptive right cannot be acquired unless the use defines its bounds with reasonable certainty")).

It is axiomatic that one who obtains a right to pass and repass over the land of another does not ordinarily possess the right to conduct a specific activity or activities over the land by virtue of his right to traverse an easement. In my opinion, the decision of the majority amounts to a prescriptive easement for recreational use in this lake, a situation not favored in the law. *See* 25 Am.Jur.2d *Easements and Licenses* § 45 at 615 (1996) ("Prescriptive [easements] * * * are not favored in the law, since they necessarily work corresponding losses or forfeitures of the rights of other persons").

It should be noted that the state claimed a recreational easement in the entire lake by virtue of "(1) riparian rights, (2) navigability and the public trust doctrine, (3) prescription, (4) adverse possession and (5) dedication has

been interfered with [*sic*]." The state's proof failed miserably on a number of issues. First, although the state indicated both at trial and again at oral argument and the trial justice declared that the state was not litigating the rights of the so-called riparian owners and was only pursuing the rights of the public, the state nonetheless attempted to litigate the issue of riparian ownership rights. However, the evidence adduced at trial firmly established that these abutters for the most part,[5] have no right to the shores of the lake because defendant corporation owns the land surrounding the lake and these properties merely abut the land of defendant corporation. Moreover, as defendant's evidence established, the wharves that serve these properties and where many of these recreational vessels are moored during the season were, in fact, constructed with the express permission of defendant's predecessor and extend into the lake at the sufferance of defendant. Indeed, although many of these witness-landowners may enjoy a right to launch their boats from the state's boat ramp after today, they ultimately may find they have no wharf at which to dock them. Secondly, the state presented no evidence respecting its public duty and navigability claims. Thirdly, the state's rather convoluted dedication claim was rejected by the trial justice out of hand. The state posited that, by virtue of the fact that the defendant corporation conveyed some waterfront lots, it made an implied dedication of the reservoir for public purposes, with an acceptance by the "public" of this dedication, similar to the dedication of

[5] This situation may be different with respect to those owners who acquired lots directly from the defendant corporation.

streets in a subdivision. The trial justice appropriately noted that "[d]edication is an exceptional and unusual method of passing title to [an] interest in land" and will not be inferred from mere permissive use of unenclosed land. The trial justice concluded that the state produced no evidence that the landowner intended to offer the reservoir to the public and denied the claim. The state has not pursued this argument on appeal.[6] Accordingly, the issues that are appropriately before this Court do not include a recreational easement and ought to be strictly limited to whether the placement and use of the boat ramp amounts to a prescriptive easement for boat access only.[7]

Further, I disagree with the majority's reliance on a selective portion of the trial justices decision entitled "facts and travel" as the controlling findings in this case. With respect to the adverse possession claim the trial justice made the following findings of fact and conclusions of law in this case:

Findings of Fact and Conclusions of Law

"The [c]ourt, in its consideration of the claims that the State has achieved for itself and for the

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[6] This claim has been transmuted into an estoppel argument, not raised below, that the combination of public use and overt acts by the private landowner that give rise to reasonable reliance amounts to an estoppel that works to preclude defendant from denying the public nature of the reservoir. Obviously, the issue is not appropriately before the Court and flies in the face of the state's assurances that it was not litigating the rights of the lakefront owners.

[7] Indeed, the state acknowledges this in its brief when it cites to the testimony of John O'Brien, the deputy chief in the Division of Fish and Wildlife who testified that the purpose of the boat ramp was to provide boating access to the water.

general public, an easement by prescription in, on, over and across the full length and breadth of the lake, makes the following findings of fact and conclusions of law based on its careful consideration of the credible evidence, exhibits, and testimony heard at trial and the entire record. That the lake is owned in fee simple by the Corporation, holding good, valuable and exclusive title in and to the waters of the said lake, the lake bed or land over covered by the waters of the lake and the dam designated as Rhode Island Dam # 016. That the lake is an artificially created body of water made by and for the exclusive purposes of the Corporation's predecessors in title in 1860.

"That the State has failed to prove by a preponderance of the credible evidence in a clear and convincing fashion that the public or any individual member of such public has gained or achieved any right, title or interest in the lake for any purpose whether by prescriptive easement or adverse possession.

"The [c]ourt finds that no witness for the State, or the general public, has proven by clear and convincing evidence that their collective or individual use of the lake was pursued under a claim of right or was in any way hostile, open, notorious, or adverse to the interests of the Corporation. The [c]ourt also finds that in the absence of such proof and in the face of the overwhelming credible evidence provided by the documentary evidence introduced at trial by the defense, that the Corporation is the owner of said lake as aforesaid, and that any use engaged in by any member of the public of the lake, whether swimming, boating, or fishing was done at the sufferance of, and with the permission of, the Corporation and its predecessors in title from the

> time of its lake's [*sic*] formation to the withdrawing of said permission by the defendant in 1997.
>
> "The [c]ourt further finds that the State has failed to prove by a preponderance of the clear and convincing evidence that the State has achieved for itself an easement by prescription, over, on, or in the lake.
>
> "The State's witnesses have established only those contacts which are incidental to the normal and legitimate authority of the sovereign such as patrolling the lake to enforce the laws of the State, issuing permits for the use of the State boat ramp, periodic maintenance and repair of the boat ramp and the stocking of some species of fish on an occasional basis and inspection of the dam # 016.
>
> "The [c]ourt finds that the State's assertion or claim of right to either adverse possession or a prescriptive easement to the lake is of recent vintage, well within the ten years required by law to establish a claim of that nature and that fact notwithstanding, the State in no aspect of this case established by clear and convincing evidence that its claim of interest in either the lake, lake bed, or dam, were in any way made under a claim of right, hostile, or adverse to the owner Corporation or its predecessors in title from the construction of the boat ramp to the present."

This case is nothing more than a failure of proof on the part of the state that bore the heavy burden of establishing, by clear and convincing evidence that it possessed a portion of the lake bottom and had acquired a prescriptive easement to use the lake for recreational purposes and that its possession was open, notorious, hostile and under a claim of right for the full statutory period. *See*

Burke-Tarr Co. v. Ferland Corp., 724 A.2d 1014, 1020 (R.I.1999); *Palisades Sales Corp. v. Walsh,* 459 A.2d 933, 936 (R.I.1983). It is fundamental that one who claims an interest in land through adverse possession bears a heavy burden of proof. *See Donnelly v. Cowsill,* 716 A.2d 742, 748-49 (R.I.1998) (actual, open, notorious, hostile and continuous use under a claim of right must be proven by clear and convincing evidence in order to establish an easement by prescription); *see also Palisades Sales Corp.,* 459 A.2d at 936; *Altieri v. Dolan,* 423 A.2d 482, 483 (R.I.1980); *Martineau v. King,* 120 R.I. 265, 268, 386 A.2d 1117, 1119 (1978); *Jerry Brown Farm Association, Inc. v. Kenyon,* 119 R.I. 43, 51, 375 A.2d 964, 968 (1977); *Russo v. Stearns Farms Realty, Inc.,* 117 R.I. 387, 391, 367 A.2d 714, 716-17 (1977); *Foley v. Lyons,* 85 R.I. 86, 90, 125 A.2d 247, 249 (1956); *and see Daniels v. Blake,* 81 R.I. 103, 109-10, 99 A.2d 7, 10-11 (1953) ("the admitted friendly relations between respondent and complainants while the latter were openly using the strip to pass to and from the shore and before they asserted the existence of a public easement tends to establish their use originally as merely permissive. We also think that the occasional passing of others to and from the shore was use of the same kind and not such as was calculated to put the title owner on notice that such passing was an adverse user under a claim of right"); *Earle v. Briggs,* 49 R.I. 6, 8, 139 A. 499, 500 (1927) (permissive use cannot ripen into an easement by prescription no matter how long it is continued); *Tefft v. Reynolds,* 43 R.I. 538, 542, 113 A. 787, 789 (1921) (the law presumes that a use originally permissive continues in the absence of conduct clearly indicating a change). Further, this Court has previously stated that,

> "[U]nless the evidence also shows that [passers over a disputed strip of land] were adverse in the

> beginning they cannot avail these complainants in establishing a public easement by prescription. A use originally permissive cannot be converted into an adverse use by a later use and claim of that kind. The law presumes that a use originally permissive continues in the absence of conduct clearly indicating a change. * * * And such permissive use cannot ripen into an easement by prescription no matter how long it is continued." *Daniels,* 81 R.I. at 109-10, 99 A.2d at 10-11.

There is simply no evidence in this case that demonstrates that the construction of the boat ramp was adverse at its inception.

The majority's reliance on *Talbot v. Town of Little Compton,* 52 R.I. 280, 160 A. 466 (1932) and *Burke-Tarr Co.,* 724 A.2d 1014 (R.I.1999) is incorrect and misplaced. Significantly, contrary to the majority's conclusion, *Talbot* did not involve a prescriptive easement. Rather, the complainant, under the guise of a suit in equity to restrain a trespass was in actuality attempting to establish her own title to the disputed strip of land. Her efforts to establish record title failed because she was unable to demonstrate that she, not the town and the general public, actually possessed the property. The Court never declared a prescriptive easement on behalf of the town or anyone else; in reversing the decree of the trial court, this Court declared that legal title to the property rested with the Town of Little Compton on the ground that the town originally was under the jurisdiction of Plymouth Colony in the Commonwealth of Massachusetts and the land in question "was acquired by the original proprietors of Little Compton by deed of Constant Southworth, dated April 29, 1675." *Talbot,* 52 R.I. at 287, 160 A. at 469. Further, the

Court held that these proprietors were eventually given the status of a township named Little Compton, that eventually, in 1746, came under the jurisdiction of the State of Rhode Island. The Court noted that there was no evidence that the town ever conveyed the land to anyone and considerable evidence "tending to indicate that the land was never conveyed." *Id.* Additionally, by way of *dicta,* the Court noted that the continuous and significant use of the beach by the town was also sufficient to establish an acquisition of title by adverse user, including a presumption of dedication of the common lands that the municipality held title to, in trust, for its inhabitants and the public. Significantly, the Court rejected the finding of the trial justice that the complainant held title acquired by adverse possession because "the great weight of the evidence shows that the town [and not the complainant] openly, notoriously and uninterruptedly used the entire tract under a claim of right for a length of time far in excess of the statutory period for obtaining title by adverse user." *Id.* at 286, 160 A. at 468-69. I fail to see how this case has any relevance to the case at bar in which title to the lake has never been challenged, the state does not hold any title to this property, and the trial justice specifically found that the placement of the boat ramp was done with the permission of defendant's predecessors.

I also disagree with the majority's reliance on *Burke-Tarr Co.* as support for concluding that "[t]he facts in this case supporting the existence of a prescriptive easement are even stronger than they were in *Burke-Tarr Co.*" To begin with, the easement in *Burke-Tarr Co.* was for a six-inch underground pipe to supply water to Ferland's entire apartment complex. There was no question that this installation was permanent and would be in constant use.

Additionally, defendant had an existing right of way into the property under which most of the pipe was situated, with only a portion inadvertently extending under the leased seven and one-half-foot strip. Further, the plaintiff who negotiated the lease with Ferland testified at trial and never disputed Ferland's claim of right to install the subterranean water line. At best, the plaintiff indicated that she was aware that a water line was installed under the existing right of way before it was repaved in accordance with the agreement of the parties. The trial justice rejected the claim of prescriptive easement and found that the installation "was at all times known by [Burke-Tarr] and was effected with [Burke-Tarr's] tacit knowledge and consent," and that she therefore "acquiesced to its location through the existence of the lease," thereby defeating Ferland's claim of prescriptive easement. *Burke-Tarr Co.*, 724 A.2d at 1017, 1019. We rejected this finding for two reasons, first, the lease did not provide for the installation of subterranean drains and pipes and an inference of permissive use, which would defeat the element of hostile use, "cannot properly be drawn from the *lone fact* that the parties entered into a written lease for the seven and one-half foot strip of land," (emphasis added) nor was plaintiff's "testimony that she was aware that a water line was being installed is not sufficient to establish that the water line was installed with her express or implied permission." *Id.* at 1019. Significantly, the plaintiff never disputed Ferland's claim of right to install the water line under its own right of way, nor did she testify that the waterline was installed with her permission. This is inapposite to the case before us, in which the state never made a claim of right nor did it present a scintilla of evidence that its construction of the boat ramp was hostile. Indeed, like the situation in *Talbot,* the evidence is quite to the contrary.

The trial justice found, and I wholeheartedly agree, that the state failed miserably in its attempt to meet its burden of proof. This failure, in my opinion, occurred because there is no evidence that the state did anything on that lake without the permission of the owners, express or implied. Indeed the trial justice specifically found as a fact that,

> "the reasonable inferences to be drawn from the evidence adduced at trial as provided from testimony of the State's primary witnesses * * * regarding the construction and maintenance of the boat ramp over some 32 years is that, until the controversy arose regarding the lake, generally in 1996-1997, the State asserted no right or property interest in the portion of the lake bed covered by the submerged portion of the boat ramp. There is no evidence that the State ever asserted or exercised any rights adverse to the owner of the lake bed."

It is understandable that a fact-finder would wonder why the State of Rhode Island, the sovereign and the repository of all documents dealing with state property, including the construction of a boat ramp, could not produce a single piece of paper referring to this project. This is particularly telling when respondent has produced reams of solid evidence demonstrating that the lake owners jealously guarded their ownership of the lake and enjoyed a long-term, friendly and permissive relationship with the state through the plaintiff's predecessor agency. Significantly, as the trial justice noted, in 1938, the chief of the State Division of Fish and Game Department of Agriculture and Conservation, wrote to the owners of the lake concerning the low water level of the reservoir during a period when the dam was undergoing repairs and

expressed his concern that the owners, like his agency "would be most anxious that nothing takes place in ponds or streams *over which you had jurisdiction* that would tend to destroy the fish life that makes up such a great part of the recreation for a large number of people." (Emphasis added.) In their reply, the owners assured the state agency that the lake over which they had jurisdiction would be restored to its previous level after the necessary repairs were made to the dam. Further, the trial justice noted the numerous documents evidencing the fact that the corporation's predecessor in title frequently granted permission to use the lake to individuals and groups that established a continuous record of active and affirmative control of the lake from 1937 through 1983 and informed the plaintiff or its predecessor of these grants. The trial justice referred to a series of letters that were introduced into evidence, establishing that abutting landowners frequently requested permission of the owners to construct retaining walls or wharves in front of their property, but on land controlled by the corporation, and noted that the response from the corporation to each request clearly outlined the rights retained by the corporation. Included in these exhibits are letters written in 1953 in which the owners reluctantly denied several requests for permission to construct retaining walls and wharves on various properties surrounding the reservoir, and concluded that if the water level in the reservoir was increased to the extent of the corporation's flowage rights, abutting property would be adversely affected. The owners' rationale for refusing these requests was:

> "The dam at Pascoag Reservoir was built for the sole purpose of storing water to be used for industrial purposes by the several mill sites who own and control the operation of the Reservoir.

> The Reservoir Corporation has never relinquished any of its flowage rights which it has held since 1860 although we have tried through the years to be very considerate of the campers around the Reservoir, but all of them would be well advised to always keep in mind the prime purpose of the Reservoir."

Thus, as of 1953, there was no question that the owners were cognizant of the full extent of their ownership rights and had every intention of asserting those rights when appropriate. Further, in 1962, three years before the construction of the boat ramp, the owners of the lake wrote again to the State Division of Harbors and Rivers (the same state agency that purchased the lot in 1964 and erected the boat ramp in 1965) and indicated that, as the entity that controls the water rights of the Pascoag Reservoir, permission had been given to the Pascoag Ski Club to hold an exhibition of water skiing events at the Reservoir on August 26, 1962.[8] The abundant evidence in the record that clearly demonstrated that the owners of the lake routinely granted permission to members of the public to use the reservoir for recreational purposes, defendant's permissive relationship with the state and the lack of any evidence supporting the state's position led the trial justice to draw the only reasonable inference in this case: that the placement of the boat ramp and the collective and individual use of the reservoir was not done under a claim of right but rather these activities were done with the

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[8] The trial justice found this exhibit to be in direct contradiction to a witness for the state "who testified that he was involved in these ski exhibitions for three years and never sought or received permission from the Corporation to hold these water ski events."

permission of the owners, thereby defeating the state's claim of adverse possession and prescriptive easement.

This Court frequently has held that a trial justice sitting as a fact-finder is charged with the duty to draw inferences from established facts and that his or her "conclusion will be accepted by this [C]ourt if the inference he [or she] drew was reasonable even though other equally reasonable inferences might have been drawn." *Jerry Brown Farm Association, Inc.*, 119 R.I. at 51, 375 A.2d at 968; *see also Belliveau Building Corp. v. O'Coin*, 763 A.2d 622, 626 (R.I.2000) (espousing the well-settled principle that this Court will not disturb the findings of fact of a trial justice sitting without a jury in a civil matter unless such findings are clearly erroneous or unless the trial justice overlooked or misconceived material evidence); *see DiLuglio v. Providence Auto Body, Inc.*, 755 A.2d 757, 765 (R.I.2000); *Paradis v. Heritage Loan and Investment Co.*, 701 A.2d 812, 813 (R.I.1997) (mem.); *Harris v. Town of Lincoln*, 668 A.2d 321, 326 (R.I.1995); *Gross v. Glazier*, 495 A.2d 672, 673 (R.I.1985); *Lisi v. Marra*, 424 A.2d 1052, 1055 (R.I.1981). Here, the majority is rejecting this very reasonable inference drawn from the overwhelming proof in favor of defendant and instead, drawing its own inference to support the desired result. This is contrary to our established precedent and, based on the failure of the state's proof in this case, is not warranted. *See Providence & Worcester Co. v. Exxon Corp.*, 116 R.I. 470, 485-86, 359 A.2d 329, 338 (1976) (trial justice's conclusions will be accepted by this Court if the inference was reasonable, even if other equally reasonable inferences could be drawn).

Accordingly, the trial justice found that the state had failed to meet its burden of establishing by clear and

convincing evidence, the actual, open, notorious, hostile and continuous use under a claim of right on behalf of the general public simply by virtue of a boat ramp constructed in 1965 and the fact that people who resided around the reservoir used the ramp to launch their boats. The trial justice rejected the state's claim of an easement by prescription in light of the well-accepted rule that prescriptive rights are not favored in the law because they work a forfeiture on the rights of landowners. Here, the trial justice found that the state failed to demonstrate that the placement and use of the boat ramp was by claim of right. Indeed, he found it to have been at the sufferance of the owners and further found that the state failed to produce any evidence to the contrary. The record is clear that not a single witness testified about the circumstances that led to the construction of the boat ramp, and no witness even suggested that its placement or the use of the lake by the public was by claim of right. Indeed, a fair reading of the record in this case suggests that the state was stunned by the voluminous documentary proof offered by the respondent establishing a long history of beneficence toward the abutters and the public to use and enjoy the reservoir. Tellingly, the argument by the state sums up the result the majority has reached today:

> "Well, the mills have gone south and times have changed, so what is the economic utility of this [reservoir] now? It's to support residential subdivision along the shores."

In my opinion, the owner should be compensated.

Finally, the trial justice also appropriately concluded that the state's claim of a prescriptive easement is of recent vintage and was the result of unsuccessful efforts to reach an amicable resolution between defendant and the

state with respect to a prospective purchase of the lake coupled with the state's demand that defendant undertake a multimillion-dollar dam rehabilitation project. The trial justice noted that in 1998, the state dam inspector sent a letter to the attorney for the corporation, noting that respondent was the owner and/or operator of the dam and included a series of recommendations for the maintenance of the dam. The state also sent a pamphlet entitled "Dam Ownership, Responsibility and Liability," which forewarned defendant that any problem with the dam would result in the imposition of strict liability for damages.

On April 22, 1998, a temporary restraining order was entered in the Superior Court, enjoining and restraining the corporation from any unauthorized alterations of the freshwater wetlands on the property surrounding the reservoir without prior approval of DEM, including but not limited to draining the water from the reservoir and returning the gate of the dam to its previous setting. A supplemental restraining order was entered on April 27, 1998, ordering that DEM be given access to the gate of the dam, and the gatehouse, no more than twice per day for inspection purposes. On June 30, 1998, a justice of the Superior Court gave respondent the full responsibility to regulate the gates of the dam and insure that the reservoir maintained a specified water level at all times. On August 13, 1999, that same justice of the Superior Court entered a temporary restraining order enjoining and restraining the corporation from interfering with the operation of the gate of the dam, thereby preventing respondent from raising or lowering the water level in the reservoir. Further, on July 8, 1998, a preliminary injunction was granted ordering the corporation to maintain a particular water level from March 1 to October 15, and another level was to be

maintained for the remainder of the year. On October 28, 1998, the trial justice found that respondent was in violation of the July 8, 1998 order and ordered the corporation or its agents to manipulate the gates of the dam to reduce the water level for the reservoir to achieve and maintain a particular water level. All these orders were entered at the instance of the state and were intended to maintain the water level in the reservoir at a level conducive to boating activities during the spring and summer and to drain the reservoir during the winter for the convenience of the abutters. Thus, respondents have been placed in the unenviable position of bearing strict liability for any damage resulting from a failure of the dam, have been burdened with an easement for recreational boating over the entire lake and because of this easement, have been precluded from draining the lake to avoid these hazards. This is the very situation that the corporation sought to avoid, as evidenced by letters dating as early as the 1950's, in which the corporation expressed concerns about people infringing on their property rights without permission, thus imposing liability on the corporation. The result created by the majority amounts to a taking by the state without compensation.

In his conclusion, the trial justice stated,

> "It is well recognized by this [c]ourt that Echo Lake, so called, has played an important role in the lives of many citizens of Rhode Island. This [c]ourt has determined that its use by the public has been permissive through the assent of both the defendant Corporation and its predecessors in title. Private property rights are among the most important and hallowed rights enjoyed by citizens of this State. It is beyond this [c]ourt's authority to deprive a private landowner of the

> rights inherent in ownership because a landowner has chosen to allow others to benefit from his property. To do so would be to penalize the generosity of private landowners."

I agree with the findings of the trial justice and am of the opinion that the decision of the majority is incorrect and unjust. Consequently, I dissent.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

PASCOAG RESERVOIR & DAM, LLC	:	
	:	
vs.	:	C.A. NO.
THE STATE OF RHODE ISLAND, acting by and through JAN REITSMA, in his capacity as Director of the RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, and SHELDON WHITEHOUSE, in his capacity as Attorney General for the State of Rhode Island	:	01-505

COMPLAINT

This complaint seeks damages and a declaration of rights arising out of the taking of the Pascoag Reservoir by the State of Rhode Island. The Plaintiff is entitled to damages under the United States Constitution and the Rhode Island Constitution. Moreover, it is entitled to a declaration that the State of Rhode Island is responsible for the repair, maintenance and upkeep of the Pascoag Reservoir and the underlying dam, without which there would be no reservoir. Finally, the Plaintiff is entitled to damages as compensation for real estate taxes and other local charges paid by it.

Parties

1. Plaintiff Pascoag Reservoir & Dam, LLC ("Pascoag") is a Rhode Island Limited Liability Company.

2. The Defendants include the State of Rhode Island (the "State") and Jan Reitsma ("Reitsma"), in his capacity

as Director of the Rhode Island Department of Environmental Management ("DEM"), and Sheldon Whitehouse ("Whitehouse"), in his capacity as the Attorney General of the State of Rhode Island.

3. Reitsma and Whitehouse, at all times relevant hereto, have acted on behalf of the State, which does not enjoy any immunity arising out of the actions discussed further within.

Jurisdiction

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, and is based upon the Fifth and Fourteenth Amendments to the United States Constitution (which prohibit the taking of private property without just compensation); and 28 U.S.C. §§ 2201, 2202 (which provide for the granting of declaratory relief).

5. This Court has jurisdiction over Pascoag's remaining claims, based upon state law, under the doctrine of supplemental jurisdiction as set forth within 28 U.S.C. § 1367.

Facts

6. Pascoag is the undisputed owner of record of a body of water often known as the Pascoag Reservoir (and, sometimes, alternatively, as Echo Lake). The Pascoag Reservoir consists of approximately 350 acres located within the Town of Burrillville, Rhode Island and, to a lesser extent, in the Town of Glocester Rhode Island.

7. The Pascoag Reservoir is a man made body of water that was created in 1860 by various riparian mill

owners, associated together as the Pascoag Reservoir Association, to power their mills.

8. The Rhode Island General Assembly enacted a law in 1925 incorporating the Pascoag Reservoir Corporation to, *inter alia*, acquire or succeed to the right title and interest of the Pascoag Reservoir Association "for the purpose of acquiring, holding, maintaining, regulating, using and disposing of the Pascoag Reservoir" (**Exhibit 1**).

11. Although ownership of the Pascoag Reservoir Corporation changed from time to time, title to the Reservoir itself remained vested in that corporation through 1990.

12. On or about January 5, 1990, the owners of the Pascoag Reservoir Corporation conveyed the Pascoag Reservoir to the Pascoag Investment Corporation. Subsequently, on or about July 24, 1995, the Pascoag Investment Corporation conveyed the Pascoag Reservoir to Pascoag. Absolute title in fee simple in and to the Pascoag Reservoir remains vested in Pascoag today.

13. Pascoag and its predecessors have long permitted the public to use the Pascoag Reservoir. Indeed, the State has itself acknowledged this, as early as 1938.

14. For example, on December 6, 1938, DEM's predecessor, the Department of Agriculture and Conversation, wrote to Austin Levy, who managed the Pascoag Reservoir on behalf of the Pascoag Reservoir Corporation, and requested the corporation do nothing to imperil the fish population within waters "over which you have jurisdiction" (**Exhibit 2**).

15. More recently, DEM, through Reitsma, has been charged with the power and duty "to supervise and control

the protection of the natural resources of the state, such resources including (but not limited to) water . . . reptiles, amphibians, fish, shellfish and other forms of aquatic . . . life." R.I.G.L. § 42-17.1-2. DEM is also charged with the administration of hunting and fishing, R.I.G.L. § 42-17.1-4(B); the administration of boating safety, R.I.G.L. § 42-17.1-4(H)(1)(2); and the inspection of dams and reservoirs. R.I.G.L. § 42-17.1-4(E).

16. The State, acting through DEM, has repeatedly insisted that Pascoag and its predecessors are responsible for the repair, maintenance and upkeep of the Pascoag Reservoir (together with the dam supporting the reservoir) because they owned the same. *See*, correspondence to this effect, dated as early as July 10, 1979 (**Exhibit 3**) and as late as October 14, 1997 (**Exhibit 4**).

17. In 1965, the State, acting through DEM, constructed boat ramps on several reservoirs, private and otherwise, located within the State of Rhode Island, including the Pascoag Reservoir.

18. In 1996, DEM abandoned an attempt to enlarge the boat ramp due to "our inability to acquire an easement or fee title" to the Pascoag Reservoir. *See*, DEM internal memo, dated December 3, 1996 (**Exhibit 5**).

19. The State had indeed negotiated to buy the Pascoag Reservoir intermittently between 1987 and 1997. These discussions broke down completely during 1997.

20. On July 8, 1997, DEM wrote to counsel for Pascoag inferring to Pascoag for the first time in writing that the State has acquired an interest in and to the Pascoag Reservoir by adverse possession or prescription (**Exhibit 6**).

21. The State's claims were first conceived and advanced to the Plaintiff in 1997 as a result of its unsuccessful attempts to negotiate the purchase of the Pascoag Reservoir.

22. On or about April 22, 1998, the State, acting through Reitsma and Whitehouse, filed a two count complaint against Pascoag in the Superior Court for the State of Rhode Island, sitting in Providence County, styled as *Reitsma, et al. v. Pascoag Reservoir & Dam, LLC*, and numbered as civil action 98-1946 (**Exhibit 7**).

23. The State's complaint alleged in Count I that Pascoag had violated the Rhode Island Freshwater Wetlands Act, R.I.G.L. § 2-1-21; and in Count II that the State had acquired a recreational easement over the Pascoag Reservoir pursuant to various real estate doctrines denominated therein as "riparian rights, navigability and the public trust doctrine; prescription; adverse possession; and dedication."

24. The State's Complaint proceeded to trial on only Count II, resulting in judgment for Pascoag. *See*, decision of Judge Darigan, filed April 3, 2000 (**Exhibit 8**).

25. The State appealed Judge Darigan's decision to the Supreme Court for the State of Rhode Island, which reversed in an unusual 3-2 decision, marked by a strong dissent which concluded that the majority's decision was both "incorrect and unjust." *See*, Supreme Court decision filed June 20, 2001 (**Exhibit 9**). Judgment has since been entered in the Superior Court consistent with the Supreme Court's decision. *See*, Judgment entered on September 24, 2001 (**Exhibit 10**).

26. The Rhode Island Supreme Court held, *inter alia*, that the State had acquired a portion of the lake bottom (beneath the boat ramp) by adverse possession and a prescriptive easement on behalf of the public to use the boat ramp to obtain access to the Pascoag Reservoir for "boating, fishing, swimming and other recreational purposes."

27. The State has not filed any similar actions or made any like claims against the owners of other privately owned reservoirs encumbered by boat ramps constructed by the State circa 1965 or at any other time(s).

Count I

(Taking of Private Property for public Use without Just Compensation in Violation of the Fifth and Fourteenth Amendments to the United States Constitution)

28. Pascoag incorporates by this reference paragraphs 1 through 27 of this Complaint.

29. The State's acquisition of the aforesaid interests has resulted in a total and/or partial deprivation of Pascoag's beneficial use of the Pascoag Reservoir and/or an interference with Pascoag's investment-backed expectations in that property.

30. The State's acquisition of the aforesaid interests amount to an inverse condemnation or taking without just compensation in derogation or rights secured to Pascoag by the Takings Clause of the Fifth Amendment to the United States Constitution, which is binding upon the States through the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Count II

(Taking of Private Property for Public Use without Just Compensation in Violation of Article I, §§ 2, 16 of the Rhode Island Constitution)

31. Pascoag incorporates by this reference paragraphs 1 through 30 of this Complaint.

32. The State's acquisition of the aforesaid interests amount to an inverse condemnation or taking without just compensation in derogation or rights secured to Pascoag by Article I, §§ 2, 16 of the Rhode Island Constitution.

Count III

(Declaratory Judgment pursuant to 28 U.S.C. §§ 2201, 2202, and R.I.G.L. § 9-30-1, et seq.)

33. Pascoag incorporates by this reference paragraphs 1 through 32 of this Complaint.

34. The State, by dint of the Rhode Island Supreme Court decision, is the dominant estate, in real estate parlance, and, as such, is responsible for the repair. maintenance and upkeep of the Pascoag Reservoir and the underlying dam, without which there would be no reservoir.

Count IV

(Damages)

35. Pascoag incorporates by this reference paragraphs 1 through 34 of this Complaint.

36. The State must reimburse Pascoag for real estate taxes and local assessments paid by it or its predecessors to the Town of Burrillville, the Town of Glocester, and any local fire district(s).

Wherefore, Pascoag prays that this Honorable Court enter Judgment in its favor against the various Defendants as follows:

1. Award damages arising out of the taking of private property for public use, as contemplated by the United States Constitution and the Rhode Island Constitution, together with interest and costs;

2. Declare that the State is responsible for the repair, maintenance and upkeep of the Pascoag Reservoir and the underlying dam;

3. Award damages sufficient to reimburse Pascoag for all real estate taxes and local assessments paid by it or its predecessors to the Town of Burrillville, the Town of Glocester and any local fire district(s);

4. Award attorney's fees, pursuant to statute, either federal or state, or common law; and

5. Award such other relief as this Court deems fair and just.

PASCOAG RESERVOIR & DAM, LLC,
By its Attorney,

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DATED: October 18, 2001